

DUTIES TO TRESPASSERS: A COMPARATIVE SURVEY  
AND REVALUATION

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## INTRODUCTION

THE law governing the liability of an occupier to persons injured while on his property seems to have been perdurably frozen in the trident of channels dug by the judges of the nineteenth century. Invitees, licensees and trespassers—these are all we know and all we need to know. It is true that of late there have been subsurface rumblings and, in other common-law jurisdictions, even cracks in the ice. So, England has recently abolished the distinction between licensees and invitees, and imposed on the occupier a “common duty of care” toward all lawful visitors.<sup>1</sup> This legislation sprang from a feeling, strongly expressed in recent years, that the character of the plaintiff in his lawful entry on the defendant’s premises should be no more than a relevant circumstance in determining whether the defendant has discharged his duty of care. It ought not to be imported into the law as a categorical proposition, for the answer to the question of whether the defendant has discharged his duty should depend on the totality of the circumstances.<sup>2</sup> The mechanical application of the traditional categories of visitor, and of such concepts as traps and unusual dangers, is a manifestation of the lamentable tendency to transmute propositions of fact into propositions of law, which Glanville Williams has called the “besetting sin of the law of tort.”<sup>3</sup>

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1. Occupiers’ Liability Act, 5 & 6 Eliz. 2, c. 31 (1957). The legislation was based on the Law Reform Committee, *Third Report: Occupiers’ Liability to Invitees, Licensees and Trespassers*, CMD. No. 9305 (1954). The act went into force January 1, 1958.

2. Thus, in *Hawkins v. Coulsdon & Purley Urban Dist. Council*, [1954] 1 Q.B. 319, 337 (C.A.), Lord Justice Denning (as he then was) said: “The duty is not to invitees as a class, nor to licensees as a class, but to the very person himself who is lawfully there. What is reasonable care in regard to him depends on all the circumstances of the case.”

3. Williams, *The Application of the Contributory Negligence Act to Liability for Dangerous Premises*, 13 CONVEX. (n.s.) 414, 416 (1949).

This is one movement of opinion. But alongside it there continues in many quarters a stubborn fondness for the old approach. Between invitees, licensees and trespassers, a Scottish Law Lord once said, "there is no half-way house, no no-man's land."<sup>4</sup> This emphatic assertion of the sanctity of the trichotomy still represents the structure of the law in the United States. Even in England, the feeling is prevalent that the subrules defining the duty of an occupier of land toward trespassers need no amending. The Law Reform Committee in their Third Report, while recommending the merger of licensees and invitees, expressly approved the present state of the law with respect to both adult and child trespassers.<sup>5</sup>

The purpose of this Article is to attack this branch of the law in its stubbornest entrenchment. It will be argued that the defendant's liability toward plaintiffs who are injured while trespassing could be harmoniously and profitably absorbed into a general theory of negligence. The distinct position of licensees and invitees will not be expressly considered, on the assumption that once the rules relating to trespassers are shown to be unnecessary and indeed obstructive of justice, the rules which relate to licensees and invitees will, a fortiori, be rendered superfluous. For this purpose, the case law in common-law jurisdictions will be shown to reveal that the traditional rules are under great strain and stress. This examination of the leading common-law jurisdictions, with particular emphasis on those recent developments that ease the position of the trespasser plaintiff, will be set beside the relevant civil law of France. This will be followed by an evaluation of the techniques and policies involved.

#### UNITED STATES

The domestic law on duties to trespassers has recently been the subject of such comprehensive and penetrating studies that no attempt at an extensive recapitulation will be made here.<sup>6</sup> An encapsulated general summary will be

4. *Robert Addie & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358, 371 (Scot.) (Lord Dunedin). The passage runs: "What I particularly wish to emphasize is that there are the three different classes—invitees, licensees, trespassers . . . . Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories."

5. Law Reform Committee, *supra* note 1, § 80.

6. See 2 HARPER & JAMES, *TORTS* 1435-70 (1956) [hereinafter cited as HARPER & JAMES]; James, *Tort Liability to Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953). Other helpful writings on the problem in the United States are PROSSER, *TORTS* 432-45 (2d ed. 1955); Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. PA. L. REV. 142 (1921); Eldredge, *Tort Liability to Trespassers*, 12 TEMP. L.Q. 32 (1937); Green, *Landowner v. Intruder; Intruder v. Landowner. Basis of Responsibility in Tort*, 21 MICH. L. REV. 495 (1923); James, *Inroads on Old Tort Concepts*, 14 NACCA L.J. 226 (1954); Comment, *Duty of Conduct Owed by Property Owner to Trespasser*, 38 MARQ. L. REV. 194 (1955); Note, *Landowners' Liability in New Jersey: The Limitation of Traditional Immunities*, 12 RUTGERS L. REV. 599 (1958).

followed by a survey of a few important jurisdictions and reference to individual decisions of special significance.

In the nineteenth century, the prevailing view of an occupier's duty as nothing more than an obligation to refrain from willful or wanton conduct was modified by a more merciful approach to plaintiffs who had been injured on the tracks of railroads. This exception, evidenced by the celebrated turntable case,<sup>7</sup> was in fact applied not only within the confines of the "attractive nuisance" doctrine and the child-plaintiff situation but also more broadly to adult trespassers injured by trains.<sup>8</sup> Again, in many railroad cases, child plaintiffs were held to be elevated to the status of licensee by tacit permission inferred from the inactivity of the occupier. Obtaining a wide application, this inference was sometimes applied to the advantage of an adult plaintiff.<sup>9</sup> Although occasionally rooted in the facts of the case, it was often, however, a palpable fiction used to broaden the scope of duty in situations where permission was clearly absent but where, for other reasons such as the frequency of trespassers, mitigation of doctrine seemed necessary. Its application had, and continues to have, the double demerit of caprice and deception.<sup>10</sup>

In the twentieth century, the position of the child trespasser has been progressively eased, mostly by way of an increasing and widening application of the theory of "attractive nuisance."<sup>11</sup> At the same time, more general liberalizing innovations have appeared—in some jurisdictions with a good deal of vigor but more often sporadically and shyly. If the trespasser is injured by the conduct of an activity on the premises rather than by the condition of the premises themselves, courts have been more willing to allow recovery.<sup>12</sup> The plaintiff's remedy may be rationalized within the confines of conventional doctrines when the trespasser has been injured by the occupier's initiation of a dangerous operation on the land after the trespasser has en-

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7. *Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657 (1873). England too had an early and leading turntable case which took up a very lenient position towards the child plaintiff. *Cooke v. Midland G.W. Ry.*, [1909] A.C. 229 (Ire.).

8. *Clampit v. Chicago St. P. & K.C. Ry.*, 84 Iowa 71, 50 N.W. 673 (1891); *Ahnfeld v. Wabash R.R.*, 212 Mo. 280, 111 S.W. 95 (1908); *Patton v. Railway Co.*, 89 Tenn. 370, 15 S.W. 919 (1890); *Delaney v. Milwaukee & St. P. Ry.*, 33 Wis. 67 (1873). Some jurisdictions have a "lookout" statute, requiring operators of trains to maintain a lookout, and placing a burden of proof on them to prove compliance. Under such a statute in Arkansas it has been held that neither the plaintiff's trespasser status nor his intoxicated condition prevents recovery. *Thompson v. Carley*, 140 F.2d 656 (8th Cir. 1944). A recent case allowing recovery to a "technical" trespasser on railroad tracks is *Braithwaite v. South Durham Steel Co.*, [1958] 1 Weekly L.R. 986 (Q.B.).

9. 2 HARPER & JAMES 1467-70.

10. *Ibid.* In *Lyshak v. City of Detroit*, 351 Mich. 230, 88 N.W.2d 596 (1958), Justice Smith took the view that treatment of the child plaintiff as an implied licensee was an undesirable fiction. He preferred to apply the principle that "the right of a child to life, and to life unmaimed, outweighs the landowner's right to the exclusive possession of his property." *Id.* at 248, 88 N.W.2d at 605.

11. 2 HARPER & JAMES 1447-61.

12. Annots., 40 A.L.R. 778 (1926), 156 A.L.R. 1226 (1945).

tered, for then the occupier's conduct may be regarded as wanton, at least if he was aware of the trespasser's presence.<sup>13</sup> But when the activity is a continuing one or the occupier is unaware of the presence of the particular plaintiff, the old doctrines are not so easily applied and courts may be forced to a more daring espousal of general negligence principles.<sup>14</sup> Even absent the inception of a new activity or knowledge concerning the plaintiff's presence, however, the form of the old doctrines may sometimes be used, for a court may say that an occupier who, without appropriate safeguards, conducts a dangerous activity on his premises when he knows that trespassers often come onto his land, is behaving wantonly or recklessly.<sup>15</sup> Alternatively, of course, liability is simply denied in many such cases.<sup>16</sup>

When the injury arises from the static condition of the premises, whether natural or artificial, the old doctrines have a much tighter grip than in cases of injury arising through the occupier's activities,<sup>17</sup> though it must be remembered that the distinction between condition and activity is so tenuous that it is eminently susceptible to manipulation for policy reasons. An old line of cases supports an enlarged theory of liability for dangerous conditions that exist adjacent to a highway. Plaintiffs have been allowed to recover for injuries arising from such conditions although they were "technical" trespassers.<sup>18</sup> But, with this exception, the bases of recovery for injuries caused by static dangers are still narrow. If the dangerous condition is a natural one, it is generally conceded that there is no possibility of recovery.<sup>19</sup> If the

13. Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403 (1914).

14. 2 HARPER & JAMES 1463; Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349, 364-65 (1898).

15. This was the approach used in *Blaylock v. Malernee*, 185 Okla. 381, 92 P.2d 357 (1939), discussed note 67 *infra*.

16. See, e.g., notes 24-25 *infra* and accompanying text.

17. 2 HARPER & JAMES 1435-61.

18. *Sawiki v. Connecticut Ry. & Lighting Co.*, 129 Conn. 626, 30 A.2d 556 (1943); *Ruocco v. United Advertising Co.*, 98 Conn. 241, 119 Atl. 48 (1922); *Crogan v. Schiele*, 53 Conn. 186, 5 Atl. 673 (1885); *Sanders v. Reister*, 1 Dak. 151, 46 N.W. 680 (1875); *Durst v. Wareham*, 132 Kan. 785, 297 Pac. 675 (1931); *Murray v. McShane*, 52 Md. 217 (1879) (plaintiff stopped on door sill of house to adjust his shoe and was hit by falling brick); *Holmes v. Drew*, 151 Mass. 578, 25 N.E. 22 (1890); *Runkel v. City of New York*, 282 App. Div. 173, 123 N.Y.S.2d 485 (1953) (if abandoned building which collapsed on trespassing children was located near highway, liability possible); 36 MICH. L. REV. 159 (1937); Annot., 159 A.L.R. 136 (1945); Annot., 14 A.L.R. 1397 (1921). With respect to dangerous conditions adjacent to the highway, this favorable attitude toward trespasser plaintiffs is linked with ideas of public nuisance. See *Barnes v. Ward*, 9 C.B. 392, 137 Eng. Rep. 945 (C.P. 1850), where the court held that the plaintiff's action was not barred by his trespasser status, since the excavation which rendered the way unsafe to those who used it with ordinary care was a public nuisance. See also *Healy v. Vorndrain*, 65 App. Div. 353, 72 N.Y. Supp. 877 (1901); *Gibson v. Johnson*, 69 Ohio App. 19, 42 N.E.2d 689 (1941); *Downes v. Silva*, 57 R.I. 343, 190 Atl. 42 (1937); *Haywood v. South Hill Mfg. Co.*, 142 Va. 761, 128 S.E. 362 (1925); *Harrold v. Watney*, [1898] 2 Q.B. 320 (C.A.).

19. 2 HARPER & JAMES 1435. On the difficulty of distinguishing between natural and

condition is an artificial one, the plaintiff's chances are enhanced, though the distinction between natural and artificial conditions is a blurred borderline much spotted with the blood of children. The main approach here has been through the "attractive nuisance" doctrine. Also, certain unnatural conditions have been designated as highly dangerous and liability has been based on the occupier's foresight of the presence of trespassers. For an artificial condition which, though dangerous, is not highly dangerous, the adult plaintiff will have little chance of recovery—though a child may be in a somewhat better position.<sup>20</sup>

Finally, a tendency has appeared in some jurisdictions, sharply contradicted in others, to refuse to apply the traditional occupier's immunities to defendants other than the occupier.<sup>21</sup> Welcome as this tendency may be as a contraction of unnecessary immunities, it may be criticized for introducing into the law the additional and difficult distinction between the occupier and the nonoccupier.

### *Massachusetts*

An example of a jurisdiction where the old dogmas have retained their pristine simplicity is Massachusetts. Here the sophisticated convolutions that have worried other states in their efforts to modernize the law have left the judicial mind untroubled and untainted. In 1920 and 1921, the Massachusetts courts declared that the duty of an occupier to a mere licensee (and, a fortiori, to a trespasser) was to refrain from willful or wanton misconduct.<sup>22</sup>

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artificial conditions, see the comment of the New Jersey Appellate Division in *Simmel v. New Jersey Coop Co.*, 47 N.J. Super. 509, 136 A.2d 301, 304 (App. Div. 1957), quoted in text at note 63 *infra*.

20. *Cockerham v. R. E. Vaughan, Inc.*, 82 So. 2d 890 (Fla. 1955). On artificial conditions generally, see 2 HARPER & JAMES 1435-61.

21. 2 HARPER & JAMES 1433-34; Annot., 90 A.L.R. 886 (1934). With respect to Massachusetts, New York and California, this point will be explicitly discussed. Other cases worthy of notice are *Lewis v. I. M. Shapiro Co.*, 132 Conn. 342, 44 A.2d 124 (1945) (defendant contractor held liable to trespasser on adjoining land for collapse of wall); *McCaffrey v. Concord Elec. Co.*, 80 N.H. 45, 114 Atl. 395 (1921) (trespassing status of boy on tree held relevant to deny liability of defendants who were not occupiers but maintained electric wires in tree; *but see* dissent by Peaslee, J., *id.* at 49, 114 Atl. at 397); *Phillips Petroleum Co. v. Bartmess*, 181 Okla. 501, 76 P.2d 352 (1937) (defendant owner of oil lease held liable to adjoining landowner whose cattle trespassed and were poisoned by ponds polluted by defendant's operations); *Irwin Savings & Trust Co. v. Pennsylvania R.R.*, 349 Pa. 278, 37 A.2d 432 (1944) (occupier's immunities do not apply to defendant trespassers); *Fitzpatrick v. Penfield*, 267 Pa. 564, 574, 109 Atl. 653, 657 (1920) ("The defense of no liability for injury to a trespasser is personal to the owner of the premises trespassed upon; it does not inure to the benefit of strangers to the title, adjoining owners, or other trespassers."); *Roe v. Narragansett Elec. Co.*, 53 R.I. 342, 166 Atl. 695 (1933) (defendant who has the right to exclude the plaintiff enjoys the same immunities as the occupier).

22. *Hafey v. Turners Falls Power & Elec. Co.*, 240 Mass. 155, 133 N.E. 107 (1921); *Robbins v. Athol Gas & Elec. Co.*, 236 Mass. 387, 128 N.E. 417 (1920).

No distinction was made between the natural condition of the land and dangerous appliances or operations thereon,<sup>23</sup> nor between the occupier and other persons conducting lawful business on the land.<sup>24</sup> In 1924, these views were confirmed in a case which involved a seven-year-old boy who, having been permitted to enter the premises, was burned by a fire used for heating tar. The defendant, the court felt, was under no duty to take precautions for the child's protection.<sup>25</sup>

In 1935, a licensee plaintiff was allowed to recover from a licensee defendant who had created a dangerous condition on another's premises.<sup>26</sup> The opinion did not indicate whether its rationale would be extended to the trespasser plaintiff, a question which was again raised but left unanswered in a later case the same year.<sup>27</sup> Two 1938 cases supplied the answer—a harsh one. In the first, the trespasser plaintiff, a ten-year-old boy, was injured by the collapse of a pole around which the defendants had excavated.<sup>28</sup> The injury took place on a Sunday when the defendants had left the excavations and their machinery unattended. The court held that the defendants were the owner's business invitees, enjoying in this context the owner's immunities, and that, in the absence of reckless or willful misconduct, they were not liable. This decision was quickly followed by one in which the child plaintiff, after climbing a pole in a playground, was killed by touching electric wires whose covering had rotted. The court took the view that, while on the pole, the child was a trespasser or at most a licensee, and that the action must fail inasmuch as the defendant had not created a dangerous situation in a place where others had a right of access equal to his own.<sup>29</sup> This case may be contrasted with a later decision which allowed a trespasser to recover for

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23. Relying on *O'Brien v. Union Freight R.R.*, 209 Mass. 449, 95 N.E. 861 (1911), where it was held that a licensee could not recover for injuries sustained when he was struck by ashes thrown by an engineer from a locomotive.

24. *Hafey v. Turners Falls Power & Elec. Co.*, 240 Mass. 155, 133 N.E. 107 (1921). This was a case of an injury to the plaintiff when a steel fishing rod he was carrying came into contact with overhead cables which were dangerously low. In *Sale v. East Kootenay Power Co.*, [1931] Can. Sup. Ct. 712, [1931] 4 D.L.R. 593, discussed in text at note 156 *infra*, the Supreme Court of Canada came to the same conclusion on very similar facts.

25. *Pilon v. Easthampton Gas Co.*, 248 Mass. 57, 142 N.E. 640 (1924). See also *Marengo v. Roy*, 318 Mass. 719, 63 N.E.2d 893 (1945).

26. *Sarna v. American Bosch Magneto Corp.*, 290 Mass. 340, 195 N.E. 328 (1935). This is often quoted as a leading authority on the separation of the positions of occupier and nonoccupier. The trial judge had instructed the jury that there could be no recovery if the decedent had been a trespasser.

27. *Mitchell v. Lynn Fire & Police Notification Co.*, 292 Mass. 165, 197 N.E. 456 (1935).

28. *Mikaelian v. Palaza*, 300 Mass. 354, 15 N.E.2d 480 (1938).

29. *Urban v. Central Mass. Elec. Co.*, 301 Mass. 519, 17 N.E.2d 718 (1938). The *Sarna* case, *supra* note 26, was distinguished on the ground that here the defendant had not placed a dangerous instrumentality in the path of one who would be likely to encounter it.

damage to his goods caused by the trespassing activities of another.<sup>30</sup> It would thus seem that in Massachusetts the trespasser's right of recovery, apart from cases of wanton or willful misconduct, is limited to situations in which he has been injured by one who had no more right to be on the premises than he.

The confinement of Massachusetts doctrine to liability for willful or wanton misconduct has been confirmed in a decision handed down in 1956.<sup>31</sup>

### *New York*

New York is a more typical jurisdiction. Starting with a simple allegiance to the wanton-or-willful rubric, the New York courts slowly took notice of supplementary approaches. At first, it was held that contractors working on the premises enjoyed the same immunities as the occupier,<sup>32</sup> that no special principle was applicable to dangerous activities,<sup>33</sup> and that there was no liability to a trespasser for simple, active negligence.<sup>34</sup> These views were confirmed in 1916<sup>35</sup> although, in an isolated judgment that same year, Judge Cardozo seems to have adopted a distinction between passive and active negligence and also to have looked favorably upon excluding the nonoccupier from the occupier's immunities.<sup>36</sup>

In the late 1920's, a shift occurred. It was held that a boy trespassing on a truck was owed a duty of care by the operators of a streetcar with which the truck had collided.<sup>37</sup> And the representative of a boy who had been killed after climbing scaffolding erected by a railroad company and then touching badly insulated wires maintained there by an electric company was allowed to recover against the latter, although not against the railroad.<sup>38</sup> This clear separation between the positions of the occupier and the nonoccupier

30. *Hanifin v. C. & R. Constr. Co.*, 313 Mass. 651, 48 N.E.2d 913 (1943).

31. *Trott v. Yankee Network, Inc.*, 335 Mass. 9, 138 N.E.2d 280 (1956). Other important Massachusetts decisions are *Wurm v. Allen Cadillac Co.*, 301 Mass. 413, 17 N.E.2d 305 (1938); *Haskins v. Grybko*, 301 Mass. 322, 17 N.E.2d 146 (1938); *Potter v. Gilmore*, 282 Mass. 49, 184 N.E. 373 (1933); *Ciarmataro v. Adams*, 275 Mass. 521, 176 N.E. 610 (1931); *Falardeau v. Malden & Melrose Gas Light Co.*, 275 Mass. 196, 175 N.E. 471 (1931); *Prondecka v. Turners Falls Power & Elec. Co.*, 241 Mass. 100, 134 N.E. 352 (1922); *McIntyre v. Converse*, 238 Mass. 592, 131 N.E. 198 (1921); *Wentzell v. Boston Elevated Ry.*, 230 Mass. 275, 119 N.E. 652 (1918); *Zink v. Foss*, 221 Mass. 73, 108 N.E. 906 (1915); *Mallock v. Derby*, 190 Mass. 208, 76 N.E. 721 (1906).

32. *Downes v. Elmira Bridge Co.*, 179 N.Y. 136, 71 N.E. 733 (1904).

33. *Waitzmann v. A. L. Barber Asphalt Co.*, 190 N.Y. 452, 83 N.E. 477 (1908).

34. *Roche v. American Ice Co.*, 140 App. Div. 341, 125 N.Y. Supp. 323 (1910).

35. *Abbey v. Village of Watkins*, 175 App. Div. 660, 161 N.Y. Supp. 688 (1916).

36. *Constantino v. Watson Contracting Co.*, 219 N.Y. 443, 114 N.E. 802 (1916).

37. *North v. David Donaldson Co.*, 131 Misc. 170, 226 N.Y. Supp. 382 (Sup. Ct. 1928), which should be compared with the English decision in *Farrugia v. Great W. Ry.*, [1947] 2 All E.R. 565 (C.A.), discussed in text at note 115 *infra*.

38. *Ferrari v. New York Cent. R.R.*, 224 App. Div. 182, 230 N.Y. Supp. 60, *aff'd*, 250 N.Y. 527, 166 N.E. 311 (1928).

was affirmed in 1932<sup>39</sup> and 1935.<sup>40</sup> In 1940 the *Ireland* case reviewed the law of this field<sup>41</sup> and took the position that a nonoccupier enjoys the occupier's immunities when he is acting on the occupier's behalf but not when he has come on the premises for his own purposes. This rationale is more plausible than persuasive. In some sense, of course, the defendant who is legally present is always acting for the occupier's purposes. The distinction between a man who pays rent to the occupier for the privilege of setting up a structure and the man who is paid to set up a structure for the occupier is not rooted in any functionally significant difference. Nonetheless, the *Ireland* decision now represents the law in New York and was applied to a similar situation in 1956.<sup>42</sup>

In the event of injury to a trespasser from a highly dangerous structure or activity, New York has adopted a more liberal attitude. The 1949 *French* case involved a seven-year-old boy who sustained injuries when he came in contact with the defendant's high-voltage apparatus, which was inadequately enclosed and was near an area where children often played.<sup>43</sup> It was held that a cause of action existed even if the child were regarded as a trespasser, and that an occupier who operates an inherently dangerous apparatus may owe a duty of care to those who technically are trespassers. The court felt impatient with the use of "occupier" and "trespasser" labels in this context and suggested that the questions of existence of duty and discharge of duty should be determined by an examination of the extent of risk involved.<sup>44</sup>

In spite of its refusal to accept the "attractive nuisance" doctrine, New York has reached this position by demanding that the occupier abstain from affirmative acts of negligence toward the trespasser.<sup>45</sup> Cases resulting in recovery under this approach generally are those brought by child plaintiffs. The current position, reviewed in the 1954 decision of *Mayer v. Temple Properties, Inc.*,<sup>46</sup> seems to be that the maintenance of a dangerous structure

39. *Cavanaugh v. People's Gas & Elec. Co.*, 234 App. Div. 402, 254 N.Y. Supp. 835, *aff'd*, 260 N.Y. 547, 184 N.E. 86 (1932).

40. *Ehret v. Village of Scarsdale*, 269 N.Y. 198, 199 N.E. 56 (1935). A significant feature of the *Ehret* case was that the danger zone extended beyond the premises.

41. *Ireland v. Complete Mach. & Equip. Co.*, 174 Misc. 91, 21 N.Y.S.2d 430 (App. T. 1940).

42. *Gold v. Rosenblatt*, 1 App. Div. 2d 894, 149 N.Y.S.2d 415 (1956).

43. *French v. Central N.Y. Power Corp.*, 275 App. Div. 238, 89 N.Y.S.2d 543 (1949).

44. The court was here relying on and referring to the earlier decisions of *Morrison v. New York Tel. Co.*, 277 N.Y. 444, 14 N.E.2d 785 (1938) (citing *Newark Elec. Light & Power Co. v. Garden*, 78 Fed. 74, 77 (3d Cir. 1897)), and *Kingsland v. Erie County Agricultural Soc'y*, 298 N.Y. 409, 84 N.E.2d 38 (1949).

45. See cases cited notes 43, 44 *supra*.

46. 307 N.Y. 559, 122 N.E.2d 909 (1954). Other New York cases to be noticed are *Levine v. City of New York*, 2 N.Y.2d 246, 140 N.E.2d 275, 159 N.Y.S.2d 193 (1957); *Nicoletti v. General Linen Supply Laundry Co.*, 285 App. Div. 957, 138 N.Y.S.2d 159 (1955); *Runkel v. City of New York*, 282 App. Div. 173, 123 N.Y.S.2d 485 (1953); *Pupek v. Wesnofski*, 264 App. Div. 880, 35 N.Y.S.2d 476 (1942); *Keenan v. Lawyers Mortgage Co.*, 254 App. Div. 348, 5 N.Y.S.2d 18 (1938); *Moriarty v. New York Cent.*



or operation without adequate protection and in a spot where the occupier knows that trespassers may come, will in itself constitute affirmative negligence. In view of this, one may wonder what would constitute passive negligence or what is gained by abstaining from an explicit integration of this branch of the law into the general theory of negligence.

### California

In California, an interesting tendency to invoke a theory of general negligence law has arisen. This development has been based on a provision of the California Civil Code which, much in the manner of the French *Code Civil*, comprehensively imposes liability for injuries occasioned by a want of ordinary care.<sup>47</sup> California courts have usually proceeded by way of the customary distinctions between invitees, licensees and trespassers and the graduated duties based thereon. But the suggestion has recently been made that the code provision allows an escape from these confines,<sup>48</sup> a suggestion borne out by a number of significant cases.<sup>49</sup> California is still unwilling, however, to apply a general negligence approach to cases involving static conditions of the premises.<sup>50</sup>

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R.R., 124 N.Y.S.2d 284 (Sup. Ct. 1953); *Calore v. Domnitch*, 5 Misc. 2d 895, 162 N.Y.S.2d 173 (N.Y.C. City Ct. 1957).

47. CAL. CIV. CODE ANN. § 1714 (1954). The section reads: "Everyone is responsible, not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." Compare with articles 1382 and 1383 of the French *Code Civil*, quoted in text at notes 191, 192 *infra*.

48. Note, 13 CALIF. L. REV. 72 (1924). In *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal. App. 2d 91, 96, 219 P.2d 73, 76 (1950), the court described the customary inquiry into the status of the plaintiff as trespasser, licensee or invitee as "unrealistic, arbitrary, and inelastic," and pointed out the availability in California of the statutory authority on the standard of care owed.

LA. CIV. CODE ANN. art. 2316 (1952) proclaims a general liability for negligence, but, like California, Louisiana has customarily proceeded in this area along the usual common-law distinctions between trespassers, licensees and invitees. See *Taylor v. Baton Rouge Sash & Door Works, Inc.*, 68 So. 2d 159 (La. Ct. App. 1953); Comment, *Attractive Nuisances in Louisiana*, 11 TUL. L. REV. 468 (1937).

49. *Fernandez v. Consolidated Fisheries, Inc.*, *supra* note 48, and, following the *Fernandes* case, *Radoff v. Hunter*, 323 P.2d 202 (Cal. Dist. Ct. App. 1958); *Hession v. City & County of San Francisco*, 258 P.2d 50 (Cal. Dist. Ct. App. 1953); *Fernandez v. American Bridge Co.*, 104 Cal. App. 2d 340, 231 P.2d 548 (1951).

50. This is the conclusion that seems to emerge from *Yoshiko Yamauchi v. O'Neill*, 38 Cal. App. 2d 703, 102 P.2d 365 (1940) (liability for active negligence to licensee); *Colgrove v. Lompoc Model T Club, Inc.*, 51 Cal. App. 2d 18, 124 P.2d 128 (1942) (following *Yamauchi*); *Oettinger v. Stewart*, 24 Cal. 2d 133, 148 P.2d 19 (1944) (with respect to licensees, willful-and-wanton rule confined to conditions; where active conduct involved, duty of care exists); *Wilson v. City of Long Beach*, 71 Cal. App. 2d 235, 162 P.2d 658 (1945) (no liability to child trespasser, since, even assuming duty to abstain

The contrast between the positions of the occupier and the nonoccupier defendant also has been a subject of discussion in the California cases. Apparently, the only time that a trespasser is owed a greater duty by a non-occupier than by an occupier is when the nonoccupier defendant is a trespasser himself.<sup>51</sup> A defendant who is a business visitor or invitee of the occupier enjoys the same immunities as the occupier.<sup>52</sup>

### *New Jersey*

Very advanced and liberal decisions may be found in New Jersey. An example is the *Guinn* case, an early, leading opinion ruling on the distinction

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from active negligence owed, no breach here); *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal. App. 2d 91, 219 P.2d 73 (1950) (duty to exercise reasonable care toward known licensees or trespassers so far as active operations are concerned); *Church v. Headrick & Brown*, 101 Cal. App. 2d 396, 225 P.2d 558 (1950); *Fernandez v. American Bridge Co.*, 104 Cal. App. 2d 340, 231 P.2d 548 (1951) (duty to exercise reasonable care toward known trespassers so far as active operations are concerned); *Palmquist v. Mercer*, 43 Cal. 2d 92, 272 P.2d 26 (1954) (plaintiff on runaway horse struck head on understructure of trestle maintained by defendants on land occupied by others; no liability since no active negligence); *Allen v. Jim Ruby Constr. Co.*, 138 Cal. App. 2d 428, 291 P.2d 991 (1956). California applies the doctrine of attractive nuisance but an important recent decision takes the view that the doctrine is a harsh one to occupiers and should not be extended. *Wilford v. Little*, 144 Cal. App. 2d 477, 301 P.2d 282 (1956). This case stresses the duty of parents to guard their children, and holds that a body of water, whether natural or artificial, cannot in itself constitute an attractive nuisance. See Schmidt, *Liability in California for the Drowning of Trespassing Children*, 8 HASTINGS L.J. 300 (1957); Comment, *Trespassing Children: Restatement of Torts Section 339 in California*, 46 CALIF. L. REV. 610 (1958). But compare *Reynolds v. Willson*, 308 P.2d 464 (Cal. Dist. Ct. App. 1957), where \$50,000 damages were recovered under attractive nuisance theory for injuries suffered by a two-year-old boy in a private swimming pool. The defendants had allowed children to use the pool in warm weather and had later left it in a dangerous condition. Generally, artificial bodies of water are not held to be attractive nuisances unless, as in this case, hidden perils are present. For recent demonstrations of this view see *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958); *Anneker v. Quinn-Robbins Co.*, 323 P.2d 1073 (Idaho 1958); cases cited in 21 NACCA L.J. 59-62 (1958).

51. *Anderson v. Western Pac. R.R.*, 17 Cal. App. 2d 244, 61 P.2d 1209 (1936); *Roberts v. Pacific Gas & Elec. Co.*, 102 Cal. App. 422, 283 Pac. 353 (1929); *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760 (1906). In *Langazo v. San Joaquin Light & Power Co.*, 32 Cal. App. 2d 678, 90 P.2d 825 (1939), recovery was granted against an electric company which maintained wires across a field. The defendant had violated a Railroad Commission order which had the force of law. This conduct, the court held, was negligence per se.

52. *Hamakawa v. Crescent Wharf & Warehouse Co.*, 4 Cal. 2d 499, 50 P.2d 803 (1935); *Kirkpatrick v. Damianakes*, 15 Cal. App. 2d 446, 59 P.2d 556 (1936) (a seemingly harsh decision; the plaintiff had driven her car into a private alleyway by mistake and was injured by the negligent backing of the defendant); *Borgnis v. California Ore. Power Co.*, 84 Cal. App. 465, 258 Pac. 394 (1927) (another fishing rod and sagging wire case, see note 24 *supra*); *Lindholm v. Northwestern Pac. R.R.*, 79 Cal. App. 34, 248 Pac. 1033 (1926).

between occupier and nonoccupier defendants.<sup>53</sup> The defendant there maintained a line carrying electric wires across the open land of another; he was held liable to the administrator of a plaintiff who was killed when he walked into a charged wire which had broken and was trailing on the grass. As to the owner of the land, the decedent was a trespasser or mere licensee. The court said that the landowner's immunities with respect to trespassers rest on the need to preserve the land's beneficial use and should not be extended to others. To do otherwise, the court reasoned, would be needlessly to extend an exception to the general rule that a man is responsible for those results of his negligence that are reasonably to be anticipated.<sup>54</sup> In actions against the occupier of land, however, New Jersey has traditionally applied the customary wanton-and-willful rule,<sup>55</sup> although, in a number of recent cases, there are indications that this limitation is being displaced.

For example, in the 1951 *Strang* case,<sup>56</sup> a child plaintiff recovered for burns sustained when he brushed against a fire lit on the defendant's land by the defendant's janitor and left unattended. Noting evidence that children had used the area for play, the court said that "the inquiry is whether the utility to the possessor of maintaining the condition is slight as compared with the risk to the children involved. Human safety is of far greater concern than unrestricted freedom in the use of land."<sup>57</sup> This declaration seems to find general negligence theory applicable, as did the *Harris* case in 1953.<sup>58</sup> There, the injury arose when a six-year-old child fell into a trench which had been excavated by the defendant in a lot adjacent to a school. Applying the *Strang* case, the court held that the child, a licensee by acquiescence, could collect.<sup>59</sup> The court professed to see no basis for a distinction between a dangerous instrumentality and a dangerous condition. Though the plaintiff was not acknowledged to be a trespasser, this decision, attacking as it does distinctions which are dominant in the trespasser situation, is of great importance, for it is one of the first judicial attempts to dispense with the hitherto inviolate discrimination between dangerous activities and conditions.

This radical approach was strengthened by the tone of the opinions in *Taylor v. New Jersey Highway Authority*<sup>60</sup> in 1956 and has been carried

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53. *Guinn v. Delaware & Atl. Tel. Co.*, 72 N.J.L. 276, 62 Atl. 412 (Ct. Err. & App. 1905). A similar case is *Earl W. Baker Util. Co. v. Haney*, 203 Okla. 91, 218 P.2d 621 (1950).

54. 72 N.J.L. at 278, 62 Atl. at 413.

55. *Ibid.*; *Hoberg v. Collins, Lavery & Co.*, 80 N.J.L. 425, 78 Atl. 166 (Ct. Err. & App. 1910); *Folley v. United Bldg. & Loan Ass'n*, 13 N.J. Misc. 293, 178 Atl. 95 (Sup. Ct. 1935).

56. *Strang v. South Jersey Broadcasting Co.*, 9 N.J. 38, 86 A.2d 777 (1952).

57. *Id.* at 45, 86 A.2d at 780.

58. *Harris v. Menten-Williams Co.*, 11 N.J. 559, 95 A.2d 388 (1953).

59. *Id.* at 562, 95 A.2d at 389.

60. 22 N.J. 454, 126 A.2d 313 (1956). The plaintiff was the guest of a tenant, but the drift of the judgment is generally deprecatory of the category approach to liability in this area.

further by the significant judgment of the appellate division in *Simmel v. New Jersey Coop Co.*<sup>61</sup> The plaintiff in *Simmel* was a child of four who had trespassed and been severely burned on a vacant lot recently acquired by the defendants. The lot was located across the street from a large housing project, but was used as a refuse dump where rubbish was set on fire and left to smoulder. Although the defendants denied knowledge of the presence of fires on the lot, a verdict in the plaintiff's favor was confirmed by the New Jersey Appellate Division, which said:

The jurisprudence of the past gave to the occupier of land a special privilege to be careless. But today the broad tendency of the law is to impose upon him, as upon other members of society, a duty to exercise reasonable care to avoid injury to others. . . . This tendency to subject him to that duty, with all the elasticity inherent therein, wars not only against the severe traditional views governing an occupier's liability to trespassers and licensees, but also against the somewhat mollified, yet rather particularized set of rules of the *Restatement of Torts*, §§ 329-342.<sup>62</sup>

The court went on to criticize the conventional distinctions between natural conditions, artificial conditions and activities: "But it cannot but be noticed, looking at the matter from an *a priori* standpoint, that natural conditions shade into dormant artificial conditions created by him in the past; and . . . the latter in their turn shade into his current activities."<sup>63</sup>

The court was willing to find that the defendant's knowledge of fires and habitually trespassing children on the lot constituted questions of fact for the jury. On this point the decision was reversed by the supreme court,<sup>64</sup> which took the view that the judge had misdirected the jury on the nature of the proof required to show knowledge on the part of the defendant. But the general observations of the appellate division were not disturbed by the supreme court and they stand as a peak of advancement in the progress of integrating duties to trespassers with a general theory of negligence.<sup>65</sup>

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61. 47 N.J. Super. 509, 136 A.2d 301 (App. Div. 1957).

62. *Id.* at 513, 136 A.2d at 303.

63. *Id.* at 514, 136 A.2d at 304.

64. 28 N.J. 1, 143 A.2d 521 (1958). In *Lorusso v. DeCarlo*, 48 N.J. Super. 112, 136 A.2d 900 (App. Div. 1957), the child plaintiff had been burned by a fire started on the defendant's lot by a trespasser. The appellate division, ordering a new trial, held that there may be liability for an artificial condition caused by a trespasser if the defendant occupier should have anticipated that such a condition might be set up by such a person.

65. Other recent and advanced decisions in New Jersey are *Wytupeck v. City of Camden*, 25 N.J. 450, 136 A.2d 887 (1957); *Imre v. Riegel Paper Co.*, 24 N.J. 438, 132 A.2d 505 (1957); *Diglio v. Jersey Cen. Power & Light Co.*, 39 N.J. Super. 140, 120 A.2d 650 (App. Div. 1956); *Hoff v. Natural Ref. Prod. Co.*, 38 N.J. Super. 222, 118 A.2d 714 (App. Div. 1955). New Jersey was once a somewhat harsh jurisdiction toward trespassing plaintiffs and did not recognize the attractive nuisance doctrine until the *Strang* case, *supra* note 56. See 19 NACCA L.J. 274 (1957).

*Other Jurisdictions*

Scattered throughout the welter of case law in this field are decisions which seem landmarks of liberality. Often, they are not sustained by later development or are contradicted by the broad trend of authority in the jurisdiction. Usually, they appear to result from peculiar local pressures or from the unusually tragic and horrifying nature of the victim's injury. For example, an eighteen-year-old trespasser recovered for injuries sustained when he lit a grass rope and lowered it into a disused oil well which stood some thirty to forty yards from a beaten pathway.<sup>66</sup> In neglecting to plug the well to ten feet below the surface, the defendant was in breach of statutory duty. The court held that the plaintiff was at most a technical trespasser, in the sense that he might reasonably have supposed his presence would not be objected to by the defendant, and that the defendant was guilty of wanton or reckless conduct in failing to make the well safe. This may be regarded as a satisfactory result reached by an unnecessarily tortuous line of reasoning. The court felt compelled to qualify the plaintiff's trespasser status with unreal speculations about the extent of the defendant's objection to the plaintiff's presence and was then driven to talk of an omission to take positive safeguards as reckless conduct. A similar approach is found in a later oil-well case in 1939.<sup>67</sup>

A more frank avowal of a general negligence approach is to be found in *Clark v. Longview Public Service Co.*,<sup>68</sup> in which the eighteen-year-old plaintiff was injured when her hair blew against uninsulated electric wires. She had ventured into an enclosure surrounding a pump-house and had grasped a truss-rod in order to look through a window. In spite of her apparent trespassing status, the case was presented and the jury instructed under general negligence principles. The defendants raised no objections to this presentation and the Supreme Court of Washington affirmed a verdict for the plaintiff, saying:

[I]t matters not whether the persons entering the enclosure did so by invitation, by license, or whether they were merely trespassers. There was sufficient evidence to show that the appellant must have known that

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66. *Magnolia Petroleum Co. v. Witcher*, 141 Okla. 175, 284 Pac. 297 (1929).

67. *Blaylock v. Malernee*, 185 Okla. 381, 92 P.2d 357 (1939). The plaintiff's father was an employee of the defendant and the court placed the plaintiff in the category of "technical" trespasser. It seems that in Oklahoma children below the age of fourteen are always regarded as "technical" trespassers. *Town of Depew v. Kilgore*, 117 Okla. 263, 246 Pac. 606 (1926). The jurisdiction is not otherwise liberal to trespassing plaintiffs. Leading cases are *Ford v. United States*, 200 F.2d 272 (10th Cir. 1952); *Dennis v. Spillers*, 199 Okla. 311, 185 P.2d 465 (1947); *Sinclair Prairie Oil Co. v. Smith*, 186 Okla. 631, 99 P.2d 903 (1940); *Ramage Mining Co. v. Thomas*, 172 Okla. 24, 44 P.2d 19 (1935); *Gypsy Oil Co. v. Ginn*, 115 Okla. 76, 241 Pac. 794 (1925); *Texas O. & E. Ry. v. McCarroll*, 80 Okla. 282, 195 Pac. 139 (1920); *City of Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724 (1913).

68. 143 Wash. 319, 255 Pac. 380 (1927).

young and old people were in the habit of congregating in great numbers near this pump-house, and the jury were justified in believing that the appellant should have reasonably anticipated that young people especially might enter this enclosure.<sup>69</sup>

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The duty which the owner of high-voltage electricity owes to all persons—whether invitees, licensees or trespassers—who it may have reason to believe may come into its proximity, is to guard them from injury resulting from the dangerous appliances; and it cannot relieve itself from liability, even as against a trespasser, by showing that it merely refrained from inflicting wanton and wilful injury.<sup>70</sup>

The *Clark* case can, of course, be explained as illustrating only a general tendency to impose extraordinary liability on the operators of electrical apparatus,<sup>71</sup> or, more broadly, as manifesting a special liability for those who maintain highly dangerous structures or conduct unusually hazardous activities. But these explanations are no more than oblique admissions that considerations fundamental to the general law of negligence are pertinent. The same may be said of the courts' attitudes toward railroads and dangerous conditions adjoining the highway.<sup>72</sup> The inevitable question is whether anything is to be gained by this fragmentary recognition of the utilitarian nature of the problem while expressly shutting out such considerations in the bulk of the cases.

Although the leading precedents in a few jurisdictions and isolated decisions in others exhibit an intelligent awareness of the real interests and claims that must be balanced, these advances are matched by a continuing crop of mechanical adjudications. The Kentucky courts hold that if more than 150 people daily cross a railroad track at a particular point, they become licensees

69. *Id.* at 322-23, 255 Pac. at 381.

70. *Id.* at 323, 255 Pac. at 381-82.

71. This tendency is well marked. See *Schorr v. Minnesota Util. Co.*, 203 Minn. 384, 281 N.W. 523 (1938) (where sixteen-year-old boy is injured by touching electric cables, there is a question for the jury); *Ekdahl v. Minnesota Util. Co.*, 203 Minn. 374, 281 N.W. 517 (1938) (fifteen-year-old boy recovered for injury after touching electric cable); Annot., 56 A.L.R. 1021 (1928); Annot., 17 A.L.R. 833 (1922); Annot., 14 A.L.R. 1023 (1921). But see *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E.2d 473 (1956) (fourteen-year-old boy climbed pole in wooded area frequented by children; injured by electric wires; action failed; West Virginia does not recognize the attractive nuisance doctrine). In general, Washington is not very liberal to the trespassing plaintiff. Leading cases are: *Mail v. M. R. Smith Lumber & Shingle Co.*, 47 Wash. 2d 447, 287 P.2d 877 (1955); *Meyer v. General Elec. Co.*, 46 Wash. 2d 251, 280 P.2d 257 (1955); *Deffland v. Spokane Portland Cement Co.*, 26 Wash. 2d 891, 176 P.2d 311 (1947); *Schock v. Ringling Bros. & Barnum & Bailey Combined Shows*, 5 Wash. 2d 599, 105 P.2d 838 (1940); *Bolden v. Independent Order of Odd Fellows*, 133 Wash. 293, 233 Pac. 273 (1925); *Gasch v. Rounds*, 93 Wash. 317, 160 Pac. 962 (1916); *Barnhart v. Chicago, M. & St. P. Ry.*, 89 Wash. 304, 154 Pac. 441 (1916); *West v. Shaw*, 61 Wash. 227, 112 Pac. 243 (1910); *Anderson v. Northern Pac. Ry.*, 19 Wash. 340, 53 Pac. 345 (1898).

72. See text accompanying notes 8, 18 *supra*.

and the railroad necessarily incurs a duty to take precautions for their safety.<sup>73</sup> If the number is less than 150, no such duty exists. Lines must be drawn somewhere, and there is nothing inherently ridiculous about Kentucky's arbitrary figure (though it must present a peculiar problem of evidence). But posing the question in terms of the plaintiff's elevation from the category of trespasser to that of licensee is not the most sensible way of inquiring into the reasonableness of the defendant's conduct.

A Pennsylvania decision is illustrative. The court refused recovery to a seven-year-old trespasser plaintiff who was burned by an underground fire when the surface of a rubbish dump on which he was playing gave way.<sup>74</sup> The decision turned on the fact that the subterranean location of the fire amounted to a latent condition as contrasted with an actively and apparently burning fire. In terms of potential danger, one would think a hidden fire at least as dangerous as an obvious one, but the mechanical application of the "condition" label at once rendered recovery impossible.

Admittedly, the manipulation of categories or the refusal to go beyond them need not be evidence of a mechanical judicial attitude, but rather may derive from a conscious application of judicial policy which seeks to restrict the scope of the trespasser's right to recovery.<sup>75</sup> If such is the case, it would be a great deal healthier to have this conflict exposed in the open arena of a debate on the reasonableness of requiring certain standards of behavior from occupiers of land than to have the issues damped down and obscured under the blanket of stale doctrine. In this field, frank avowals of hostility to an enlargement of the area of recovery are rare today. But as late as 1953 the Supreme Court of Indiana was willing to adopt the following pronouncement from an earlier decision:

Restrictions upon the use of property diminishes [*sic*] *pro tanto* the beneficial character of the use, and hence the law imposes restrictions as seldom as possible and never except upon the strongest grounds. The law which is reluctant to impose restraint upon an owner's use of his land even when causing damage beyond his boundary, is more unwilling to impose restraint upon a user which is dangerous only to those who intrude upon his land.<sup>76</sup>

This quotation was adopted in a case in which recovery was refused the husband of a woman who had been killed while trying to rescue her three-year-

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73. *Louisville & N.R.R. v. Jones*, 297 Ky. 528, 180 S.W.2d 555 (1944).

74. *Rush v. Plains Township*, 371 Pa. 117, 89 A.2d 200 (1952); see the dissent by Justice Musmanno, *id.* at 121, 89 A.2d at 201.

75. Cf. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 611 (1958).

76. *Neal v. Home Builders, Inc.*, 232 Ind. 160, 185, 111 N.E.2d 280, 292 (1953), quoting *Holstine v. Director Gen. of R.R.*, 77 Ind. App. 582, 593, 134 N.E. 303, 307 (1922).

old child. The infant had become trapped inside a semicompleted house which was unattended and unsecured.<sup>77</sup>

More often, a denial of recovery comes from a court's express or tacit refusal to elect one of the numerous devices that might enable it to find for the plaintiff. Such an outcome may be seen in a case in which the defendant had (with permission) parked his dirt-loading machine on church grounds at a place somewhat removed from the area used for church activities. The fifteen-year-old plaintiff played on the machine and was injured by the collapse of the loading crane which had been left suspended in the air.<sup>78</sup> Denying recovery, the court held that the plaintiff was a trespasser on the defendant's property and that the defendant's only duty was not to injure him wantonly or willfully. Although the outcome of this case may not be particularly harsh, it could well have been different if use had been made of any one of several different alternatives. The court could have found that the machine was highly dangerous and that its unsecured condition constituted wanton or reckless conduct on the part of the defendant. Alternatively, since the defendant was neither the occupier of the premises nor acting on behalf of the occupier, the occupier's immunities could have been denied him. Again, the "attractive nuisance" doctrine could have been applied in spite of the plaintiff's age. Best of all would have been a discussion of the facts in the light of general considerations of the reasonable or unreasonable behavior of plaintiff and defendant. The result in such a case might well have been the same, but the real considerations involved would have been aired and put up for debate.<sup>79</sup>

### Summary

The tangled state of the law with regard to trespassers in United States jurisdictions is revealed in the gallant but inevitably unsuccessful attempt of the *Restatement of Torts* to achieve a synthesis. The law of liability for injuries to trespassers in the *Restatement* comprises fourteen sections and a little over a thousand words.<sup>80</sup> Distinctions are drawn between (*inter alia*) trespassers, licensees and invitees; known and unknown trespassers; highly

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77. Reversing the Indiana Appellate Court, 104 N.E.2d 395 (1952). But see the Supreme Court dissents of Chief Justice Emmert, 232 Ind. at 203, 111 N.E.2d at 295, and Justice Gilkison, 232 Ind. at 191, 111 N.E.2d at 297. Compare *Wilinski v. Belmont Builders, Inc.*, 143 N.E.2d 69 (Ill. App. Ct. 1957), where an eleven-year-old boy recovered under the attractive nuisance doctrine for injuries sustained after climbing a ladder propped against the wall of an unfinished building; *Miller v. South of Scot. Elec. Bd.*, [1958] 7 CURRENT LAW § 423 (H.L. July 3, 1958) (Scot.), where a boy was injured by touching electric cables in a partly demolished building and the House of Lords held there was a *prima facie* case to be answered.

78. *Keck v. Woodring*, 201 Okla. 665, 208 P.2d 1133 (1948).

79. A vital consideration here would be the enhanced jury discretion entailed by an adoption of general negligence principles. This is discussed in text accompanying notes 291-93 *infra*.

80. RESTATEMENT, TORTS §§ 329, 333-39, 381-84, 386-87 (1934).



dangerous activities and those which are dangerous but not highly so; conditions which are artificial and highly dangerous and those which lack one of these attributes; conditions which the occupier creates or maintains and those which he does not. The concept of controllable force is also introduced. Perhaps no better job could have been done in digesting the existing law. But one can hardly forbear to inquire whether such an attempt was worthwhile, unless of course it is understood as a deliberate exposure of chaos for the purpose of encouraging reform.

#### ENGLAND

The duty owed by the occupier to the trespasser in English law is very well settled.<sup>81</sup> Leading judicial pronouncements have spoken of it as follows:

The owner of the property is under a duty not to injure the trespasser wilfully; "not to do a wilful act in reckless disregard of ordinary humanity towards him"; but otherwise a man "trespasses at his own risk."<sup>82</sup> Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.<sup>83</sup>

And the Law Reform Committee in its Third Report felt able to summarize the English position in a sentence: "The trespasser enters entirely at his own risk, but the occupier must not set traps designed to do him bodily harm, or do any act calculated to do bodily harm to a trespasser whom he knows to be, or who to his knowledge is likely to be, on his premises."<sup>84</sup>

81. In view of the tight, unitary nature of the English jurisdiction, it is necessary to deal with cases in a detailed way in order to reach a statement of the law. This section will accordingly analyze decisions in the fashion that is customary in English legal argument.

82. *Latham v. R. Johnson & Nephew*, [1913] 1 K.B. 398, 411 (C.A. 1912) (Hamilton, L.J.). Lord Justice Hamilton was here, in part, adopting the language of the Judicial Committee of the Privy Council in *Grand Trunk Ry. v. Barnett*, [1911] A.C. 361, 370 (P.C.) (Ont.).

83. *Robert Addie & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358, 365 (Scot.) (Lord Hailsham). English law thus adopted, in 1929, the so-called "Massachusetts" or harsh view of the occupier's duty to the seen trespasser.

84. Law Reform Committee, *Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers*, CMD. No. 9305, § 28 (1954). For general discussions, see SALMOND, *TORTS* 514-35 (12th ed. Houston 1957); STREET, *TORTS* 191-208 (1955); WINFIELD, *TORT* 703-17 (6th ed. Lewis 1954); Hart, *Injuries to Trespassers*, 47 L.Q. REV. 92 (1931); Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers* (pts. 1-2), 69 L.Q. REV. 182, 359 (1953); Williams, *The Duties of Non-Occupiers in Respect of Dangerous Premises*, 5 MODERN L. REV. 194 (1942).

The theoretical structure of this approach is no different when the trespasser is a child; nonetheless, on identical facts the practical outcome of a case is often different. Any trespasser may become a licensee if the landowner, by his passivity, repeatedly acquiesces in the trespass and such cases of implied license are usually those of children at play.<sup>85</sup> Furthermore, a child who comes on land as a lawful visitor will not be converted into a trespasser simply because he meddles with an attractive object, though in similar circumstances an adult would certainly be held to be trespassing.<sup>86</sup> On the other hand, the child who comes on land as a trespasser is in no better position than the trespassing adult, except that conduct on the part of the occupier may amount to recklessness when directed toward a child, although the same conduct would not amount to recklessness with respect to an adult.<sup>87</sup>

The foregoing doctrinal propositions have application only when the defendant is the occupier of the premises in question. It has become apparent in the English decisions that the law is quite different when the defendant is someone other than the occupier. The historical process by which the position of the occupier separated from that of the nonoccupier defendant is not difficult to trace.

Relevant pronouncements were rare until the past few decades. An early case in point was *Corby v. Hill*,<sup>88</sup> in which an owner of land gave permission to the defendant, who was doing building work on the land, to place materials on the owner's private road. The defendant left a pile of slates lying in such an obstructive position that the plaintiff, who was lawfully using the road with the landowner's permission, fell and was injured. Chief Justice Cockburn was content to make the point that the landowner himself would have been liable to the plaintiff for setting up a trap and that the defendant could not enjoy greater immunity than could the landowner. The nonoccupier user must exercise at least as much care toward the occupier's licensees as must the occupier himself.

In *Bolch v. Smith*,<sup>89</sup> the plaintiff, engaged as a workman in a public dockyard, was given permission by the occupiers, his employers, to use certain paths to gain access to a lavatory. The defendant was a contractor whom the occupiers had allowed to erect machinery in the yard. He placed a revolving shaft across one of the paths and the plaintiff, while returning from the

85. *Cooke v. Midland Great W. Ry.*, [1909] A.C. 229 (Ire.); *Gough v. National Coal Bd.*, [1954] 1 Q.B. 191 (C.A. 1953).

86. Cases cited note 85 *supra*; *Corp. of the City of Glasgow v. Taylor*, [1922] 1 A.C. 44 (Scot. 1921).

87. *Edwards v. Railway Executive*, [1952] A.C. 737; *Excelsior Wire Rope Co. v. Callan*, [1930] A.C. 404; *Robert Addie & Sons (Collieries) v. Dumbreck*, [1929] A.C. 358 (Scot.); *Liddle v. Yorkshire (No. Riding) County Council*, [1934] 2 K.B. 101 (C.A.); *Hardy v. Central London Ry.*, [1920] 3 K.B. 459 (C.A.); see Law Reform Committee, *supra* note 84, § 30.

88. 4 C.B. (n.s.) 556, 140 Eng. Rep. 1209 (C.P. 1858).

89. 7 H. & N. 736, 158 Eng. Rep. 666 (Ex. 1862).

lavatory, stumbled and caught his arm in the shaft, thereby sustaining severe injuries. The court found the defendant not liable. The decision seems to rest on two grounds: first, that the plaintiff had the choice of several paths which could have led him to and from the lavatory and, by selecting the one beset with danger, he had in some sense consented to the risk; and, second, that the danger was obvious and not a trap. More significantly, the point that the defendant was not the occupier was considered. Baron Wilde remarked, "I will decide the case as if it were a question between the plaintiff and the owners of the yard, because if they are not responsible for putting up the shaft, *a fortiori* the defendant is not."<sup>90</sup> The implication of this passage is ambiguous. The statement may mean that the duty of an occupier toward a visitor on his land is always more extensive than the duty imposed upon one who is not the occupier. The modern trend of the law unquestionably is in quite the opposite direction. More probably, it means that, in this particular case, the occupier owed a more stringent duty than did the defendant, since the occupier was also the employer of the plaintiff. Whatever interpretation be put on the case, it does not seem to be authority for the proposition that has been ascribed to it, namely, that the duty of a nonoccupier "is exactly the same as that of the occupier."<sup>91</sup>

The next case of any relevance is *Castle v. Parker*.<sup>92</sup> The plaintiff was a customs house officer who, in order to get to certain bonded vaults, used to take a short cut along a passageway which ran through a half-erected building. Servants of the defendant subcontractor had pierced the passageway with an opening into which the plaintiff fell. His action was unsuccessful. The opinions contain remarks which bear upon the evolution of duties to trespassers, saying that, since the defendant was a mere contractor and not the occupier, he was under no duty to keep the passageway safe.<sup>93</sup> This seems to be another faint suggestion along the lines of *Bolch v. Smith* that the duty of a nonoccupier may be less onerous than that of the occupier. Baron Bramwell observed simply that the defendant "could not be in a worse situation than the owner of the premises."<sup>94</sup>

In *Kimber v. Gas Light & Coke Co.*,<sup>95</sup> the plaintiff entered the land to view a house where workmen of the defendants, who were not the occupiers, were making repairs. The workmen failed to warn the plaintiff of a hole which they had made in the stair-landing floor, and, on stepping there, she fell and was injured. This time, the defendants were held liable and the court rejected the argument that, as nonoccupiers, they were under no duty to warn the plaintiff even of concealed dangers which they had caused. The

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90. 158 Eng. Rep. at 670.

91. CLERK & LINDSELL, TORTS 688 (11th ed. 1954).

92. 18 L.T.R. (n.s.) 367 (Ex. 1868).

93. *Ibid.*

94. *Ibid.* Baron Bramwell also remarked: "The plaintiff may possibly not have been a trespasser, though I am not quite sure of that." *Ibid.*

95. [1918] 1 K.B. 439 (C.A.).

effect of this decision is only to assert that, on the given facts, the duty of the nonoccupier was as stringent as that of the occupier. The opinion does nothing to prescribe circumstances in which the duties of the two might diverge.

This first handful of cases, then, acknowledges the possibility of some fission between the duties of occupier and nonoccupier, but does so only by implication and certainly not by way of propositional formulation. Indeed it was not until two leading trespasser cases in 1929 and 1930 that there was any serious canvassing of the view that the duty of the nonoccupier might, in some way, be the more exacting.

In the first of these cases, *Robert Addie & Sons (Collieries) v. Dumbreck*,<sup>96</sup> the defendant occupiers were held not liable for the death of a trespassing boy, aged four, who had been killed in their haulage system. But in *Excelsior Wire Rope Co. v. Callan*,<sup>97</sup> on strikingly similar facts, nonoccupier defendants were held to be liable. To distinguish these two cases is a trying task. One popular approach is to ignore the question of occupancy and to base the distinction solely on other facts. So it can be said that in *Addie*, at the moment the defendants put the haulage machinery into motion, they were not in a position to see the trespassing children, while in *Excelsior*, the man who gave the signal to start the wheel was only about twenty yards away and could easily have observed the children if he had looked around. Thus, in the latter case there may have been an element of recklessness which was absent in the former.<sup>98</sup> Another approach is to deny that the principles

96. [1929] A.C. 358 (Scot.).

97. [1930] A.C. 404.

98. This was the method of distinguishing the two cases adopted by Lord Justice Scrutton in *Mourton v. Poulter*, [1930] 2 K.B. 183, 190 (C.A.), and favored by SALMOND, *TORTS* 519-20 (12th ed. Heuston 1957). The fact that the defendants were twenty yards away from the machinery does not appear in the *Excelsior* case itself but was pointed out in *Mourton v. Poulter*, *supra* at 189. Montrose, *Note*, 17 *MODERN L. REV.* 265 (1954), points out that the *Addie* case was argued on the basis of the principles governing liability for defects in the static condition of the premises, while the *Excelsior* case was put to the court as an issue of negligence in the conduct of a dangerous activity. This is certainly a valid point and it is not suggested here that the contrast between occupiers and nonoccupiers is the *true* ground of distinction between the two cases but only that this contrast exists.

In CLERK & LINDSELL, *TORTS* 692 & n.(c) (11th ed. 1954), it is still maintained that "The duty of licensees and invitees towards trespassers is the same as that of the occupier." The learned editor refers to *Mourton v. Poulter* for this proposition but acknowledges that "in *Callan's case* . . . [the *Excelsior* case] Lord Atkin seemed to suggest some difference." Lord Atkin surely did more than "seem to suggest" and the supporting statements of Lords Warrington and Thankerton should be noticed. See text accompanying notes 99-101 *infra*.

UNDERHILL, *TORTS* 180-81 (16th ed. 1949) is, however, a vigorous advocate of the view that the idea of occupation is the vital point in distinguishing *Addie v. Dumbreck* from the *Excelsior* case. The point is noted in WINFIELD, *TORT* 711 (6th ed. Lewis 1954), and by SALMOND, *TORTS* 525 n.68 (12th ed. Heuston 1957) where, after citing the cases distinguishing the position of the nonoccupier from that of the occupier, the learned editor

governing the duty of an occupier to a trespasser had any relevance in *Excelsior*, since the defendants there were not the occupiers—a view for which a good deal of authority exists in the case itself:

[I]n cases of a similar kind questions have arisen in respect to the duty owed by owners of property or occupiers of property in relation to dangers which exist upon that property . . . . There has arisen in respect to the duties of owners and occupiers of land an elaborate series of decisions which have involved the consideration of the precise difference between invitees of the occupiers, licensees of the occupiers, or trespassers upon the land. In my view, in this case none of those questions is relevant, and that particular branch of the law which deals with the obligations of occupiers of land towards those persons who come upon the land is not at issue at all in this particular case. *The defendants in this case were not occupiers of the land in question.*<sup>99</sup>

In spite of the fact that the last sentence is not subordinated by a causal conjunction, it seems clear that Lord Atkin was ready to remove the case from the ambit of the authority of *Addie v. Dumbreck* on the simple ground that the defendant was not the occupier. Lord Warrington, too, seems to have held this view: "The question whether the children were invitees, licensees or trespassers for the purpose of a case in which the defendant has a dangerous machine on his own land is not a question which need engage our attention in this case."<sup>100</sup> And was not Lord Thankerton making the same point? He observed: "The normal class of case which has arisen . . . is where the main question at issue concerns the capacity in which the person injured got access to the property in question. . . . In the present case it seems to me that there can be no issue as regards that point."<sup>101</sup>

These passages show repeated adumbration of an incipient gulf between the positions of the occupier and nonoccupier as defendants. The possibility matured into reality in three later decisions—*Buckland v. Guildford Gas Light & Coke Co.*,<sup>102</sup> *Davis v. St. Mary's Demolition & Excavation Co.*<sup>103</sup> and *Creed v. McGeoch & Sons*.<sup>104</sup> In all three cases the plaintiffs were children. In each, the defendant did not immediately initiate a hazardous operation leading to the plaintiff's injury, though it could be said that the injury came from a source of danger stemming from activities on the land. They

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makes the comment: "It is hard to be enthusiastic about them. Why should the contractor whom I employ to dig a hole in my field be liable when I am not?" But it is not clear whether Heuston, in making this comment, is deploring the liability of the non-occupier or the absence of liability of the occupier.

99. [1930] A.C. at 412 (opinion of Lord Atkin). (Emphasis added.)

100. *Id.* at 411.

101. *Id.* at 413.

102. [1949] 1 K.B. 410 (1948).

103. [1954] 1 Weekly L.R. 592 (Q.B. 1953), Montrose, *Note*, 17 MODERN L. REV. 368 (1954).

104. [1955] 1 Weekly L.R. 1005 (Liverpool Assizes), Montrose, *Note*, 19 MODERN L. REV. 79 (1956).

are all cases in which an action against an occupier defendant might be expected to fail, yet the actions against nonoccupier defendants actually succeeded. This in itself would be highly suggestive that the idea of occupancy is crucial to the decisions, and, in fact, that very point is emphatically made in all three opinions.<sup>105</sup>

In *Buckland*, the plaintiff's decedent was killed by electrically charged wires which the defendants had strung over a tree on a farmer's land. The child had strayed from a path on the land and climbed the tree. The court was inclined to think that the plaintiff had a license to cross the field and climb the tree, but went on to say that:

[E]ven if . . . the inference ought to be drawn that she was not permitted to be in the field but was a trespasser when she was by the tree, she was nevertheless in the circumstances of this case one to whom, in my judgment, the defendants owed a duty. The classifications into which persons may fall according as, in relation to the occupier of the land, they are his invitees or his licensees or are trespassing, do not have decisive significance when considering in the present circumstances the position of the defendants. The occupier of the field might owe different duties to those who were his invitees from the duties which he owed to those who were his licensees. The duties owed by the defendants to those in the two classes would be the same. If someone trespassed on the field the duties owed to him by the occupier would be most limited . . . . In considering whether the defendants had a duty to such a trespasser, the fact that vis-à-vis the occupier of the land the person was a trespasser would be a very relevant circumstance to have in mind, but it would not in all cases be a conclusive one.<sup>106</sup>

Although the judge does not explicitly say that the defendants would not have been liable had they been the occupiers, he says enough to warrant this conclusion.

The occupancy point was made again in the second of the three cases, *Davis v. St. Mary's Demolition & Excavation Co.* The plaintiff was a child

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105. The advocates of the "activity duty" approach would prefer to have these cases decided on the theory that the defendants were engaged in current operations on the land. See Montrose, *Note*, 19 MODERN L. REV. 79 (1956). The *ratio decidendi* of the cases, however, is clearly that the defendants were not the occupiers.

106. [1949] 1 K.B. at 419-20. *Buckland's* case may be compared with the Northern Ireland decision in *McLaughlin v. Antrim Elec. Supply Co.*, [1941] No. Ire. L.R. 23 (C.A. 1940), where the plaintiff, a boy of twelve, was injured by touching electric cables after climbing a structure erected by the defendants to carry the cables. The boy was a trespasser but the defendants had breached a statutory provision by failing to post adequate warnings and in not taking adequate measures to prevent climbing. The action failed: "In my opinion the duty owed by the defendants to the plaintiff is entirely dependent on the determination of the class into which the plaintiff properly falls." *Id.* at 28 (opinion of Andrews, L.C.J.). See also the Australian decision of *Thompson v. Bankstown Corp.*, 87 Commw. L.R. 619, [1953] Argus L.R. 165 (Austl.), discussed in text accompanying notes 178-84 *infra*, and the decision of the Court of Cassation discussed in text accompanying note 240 *infra*.

who had trespassed on a site where the defendants were carrying on demolition work under contract with the owners. The child loosened some bricks in a wall which was in an unsafe condition, thus causing the wall to fall on him. The site was easily accessible from an open space where children played, and children often came there only to be ordered away by the workmen. The accident took place on a Sunday when no servants of the defendant were present.

The judge confessed that "any decision which puts the defendants in a different position from the occupier of the land is one which must be considered with very great care."<sup>107</sup> Since he had earlier admitted that "if the defendants were the occupiers of the site and the plaintiff was a trespasser, that clearly would be an end of the case,"<sup>108</sup> his finding for the plaintiff clearly shows his acceptance of the more exacting duty of a nonoccupier. This is the first case which can confidently be said to turn upon the fact that the defendant was not the occupier.

The argument was taken up in *Creed v. McGeoch*,<sup>109</sup> which presented facts similar to those in *Davis*. The nonoccupier defendant had left a trailer parked near a stretch of land often frequented by children. The inevitable child plaintiff was injured while playing with the trailer on a Saturday afternoon when none of the defendants' servants was present. The court found the defendants liable:

Much of the argument before me was directed to the question whether the defendants were in occupation of the ground on which the trailer rested. A somewhat unusual feature of this case is that the defendants seek to establish that they were in occupation and owed no higher duty to the plaintiff than such as is imposed on occupiers in respect of infant trespassers; on the other hand, the plaintiff contends that whether or no she was a trespasser vis-à-vis the true occupiers, the defendants were not in occupation and owed a higher duty . . . It may appear surprising, at least to the parties, that the measure of the defendants' obligation to the plaintiff should depend upon the answer to the question whether they were in occupation of the land. . . . It seems to me, however, that there is no escape from the conclusion that as the authorities stand the distinction . . . does exist.<sup>110</sup>

#### *Nature of Nonoccupier's Duty*

These three decisions leave no doubt that the English courts now recognize occupation of the premises by the defendant as a category which carries special legal connotations in cases of injury to those who come upon the land. The decisions also delimit the extent to which the duty of the nonoccupier

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107. [1954] 1 Weekly L.R. at 596.

108. *Id.* at 594.

109. [1955] 1 Weekly L.R. 1005 (Liverpool Assizes).

110. *Id.* at 1008. The judge eventually found the plaintiff to be a licensee, but this seems almost an afterthought in the opinion, which turns chiefly on the fact that the defendants were not in occupation.

is more extensive or more stringent than that of the occupier. In *Excelsior Wire Rope Co. v. Callan*, Lord Atkin said that the duty of the nonoccupier defendants was "to take reasonable precautions to see that the children were not injured by the occasional use to which the owners put that dangerous machine."<sup>111</sup> And in *Buckland*, the court spoke of the plaintiff as being "within the group of those whom the defendants ought to have had in contemplation." The opinion goes on: "She was a neighbour in the sense in which that word was used by Lord Atkin in what Lord Wright calls his well known aphorism in *Donoghue v. Stevenson*."<sup>112</sup> *Davis v. St. Mary's Demolition & Excavation Co.* acknowledged that the plaintiff's argument was based on *Donoghue v. Stevenson*, that is to say, upon the general duty of care in negligence, and, upholding this argument, rendered a decision for the plaintiff. *Creed v. McGeoch* also described the plaintiff's argument as resting on the general duty of care expressed in *Donoghue v. Stevenson* and then proceeded to adopt the plaintiff's position.

Thus, although the occupier of land is bound only to refrain from willful or reckless conduct toward the trespasser, the nonoccupier is bound by the more rigorous general duty to take care. It is not difficult to detect the conventional reasons for this distinction. The occupier's privileged position is said to derive from the sanctity which surrounds the possession of real property. "The ultimate reason for exempting a landowner from liability in such a case seems to be the public policy of allowing him to make the most beneficial use of his land . . ."<sup>113</sup> Since the nonoccupier lacks the divinity which

111. [1930] A.C. at 413.

112. [1949] 1 K.B. at 419. The "well known aphorism" referred to is the celebrated statement by Lord Atkin in *Donoghue v. Stevenson*, [1932] A.C. 562, 580 (Scot.), of the circumstances in which a duty of care exists:

[I]n English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. . . . The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

113. 18 HARV. L. REV. 150 (1904); see Hart, *Injuries to Trespassers*, 47 L.Q. REV. 92, 107 (1931):

The reason why an occupier will be liable to a trespasser for any positive act done with knowledge of the trespasser's presence and with the deliberate intention of injuring him, or with reckless disregard of the danger to him, appears to be



hedges landownership, he must take his chances with the ordinary principles of negligence. So runs the legend. We may today question "how far sanctity of landed property ought to be recognised as a legal value of greater importance than the physical safety of the community,"<sup>114</sup> but the origins of the doctrine are obvious.

An analogous distinction has appeared in cases in which the plaintiff was injured through the negligence of the driver of a vehicle while trespassing with respect to someone other than the driver.

The English Court of Appeal was squarely faced with such a problem in *Farrugia v. Great Western Ry.*<sup>115</sup> The plaintiff, a small boy, was running behind the defendants' truck in an attempt to remount it, having already been on it unlawfully. A box on the truck proved too large to pass under a bridge and was knocked off, injuring the plaintiff. The defendants' counsel pressed the argument that the boy was making an unreasonable and illegal use of the highway, and that he, therefore, must be considered a trespasser to whom the defendants owed no duty of care. But the court, holding that the plaintiff's action must succeed, remarked:

It appears to me that the defendants and their driver, having created between them a potential source of danger which would impinge on anybody on the highway in the near neighbourhood, must be taken to have owed a duty towards anybody who might be on the highway in the near neighbourhood, whether he was there lawfully or whether he was there unlawfully. I cannot see, on any ground of principle or common sense, why a distinction should be made between the plaintiff running in the road to get on the lorry and a foot passenger lawfully crossing the road immediately behind the lorry. I should have thought the duty was a duty to take care *vis-à-vis* anyone—not this plaintiff as such, but anyone—the general class of persons who, at the moment when the danger materialised, might happen to be in the near neighbourhood.<sup>116</sup>

It is doubtful, however, that the plaintiff would have succeeded if he had been trespassing on the truck at the actual instant when he sustained the injury, unless the defendants were guilty of reckless disregard of his known presence.<sup>117</sup> The idea of trespass toward the owner of the vehicle which

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that the law exactly prescribes the relation of an occupier to a trespasser whose presence is known. This relation is worked out in that part of the law of torts which deals with the plea of *manus molliter imposuit* as a defence to an action of assault brought against the occupier by the trespasser.

114. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 184 (1953).

115. [1947] 2 All E.R. 565 (C.A.).

116. *Id.* at 567.

117. In *Howard v. Pickfords, Ltd.*, reported only in 79 SOL. J. 69 (K.B. 1935), a child sat on a truck's running board furthest from the curb. When the truck drove away the child was thrown off and injured. It was held that the defendants, employers of the truck driver, were not liable. Apparently the driver did not breach any duty by failing to inspect the far side of the truck before driving off. But it is difficult to under-

caused the injury was probably as central in *Farrugia* as is trespass against the defendant's land in the case of dangerous premises. The status of the plaintiff as a trespasser on the defendant's property at the moment of injury thus seems to have become a vital factual element in the English law of tort.

### *Occupancy Duty and Activity Duty*

Of even more recent growth is another and more radical development which threatens to overlap and complicate the differentiation between occupiers and nonoccupiers—a distinction between injury caused by a defect in the premises themselves and injury caused by some activity or operation thereon. In the first situation—static defect—the traditional categories of entry determine the occupier's duty; in the second—active operation—the character of the plaintiff's entry is regarded as irrelevant, at least if he is a lawful visitor, and the liability of the occupier must be established in the light of general principles of negligence.

The earliest expression of this approach is generally taken to be found in the 1954 judgment of Lord Justice Denning (as he then was) in *Dunster v. Abbott*.<sup>118</sup> The plaintiff was a salesman who, while leaving the defendant's house on a dark, wet night, walked into a ditch. The defendant, thinking the plaintiff had safely departed, switched off an outside light which might have assisted the plaintiff in finding his way out. Although the court held that the defendant was not in breach of any duty, Lord Justice Denning said:

[I]t does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises. It is concerned with dangers that have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the prem-

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stand how the driver could mount the cab of the truck and make a prudent start without seeing the child on the running board. Although the decision is very briefly reported, it seems a fair conjecture that the court was strongly moved by the trespassing status of the child. Two decisions of the English Court of Appeal have held that where a master prohibits his driver from giving lifts, the master is not liable to passengers who are injured by the driver's negligence when they have been given rides in defiance of the master's orders. *Twine v. Bean's Express Ltd.*, 62 T.L.R. 458 (C.A. 1946); *Conway v. George Wimpey & Co.*, [1951] 2 K.B. 266 (C.A.). These cases raise a fundamental question of the nature of a master's liability in tort, on which see Hughes & Hudson, *The Nature of a Master's Liability in the Law of Tort*, 31 CAN. B. REV. 18 (1953); Newark, *Twine v. Bean's Express, Ltd.*, 17 MODERN L. REV. 102 (1954).

118. [1954] 1 Weekly L.R. 58 (C.A. 1953); see Montrose, *Note*, 17 MODERN L. REV. 265 (1954). Newark, *supra* note 117, at 109-13, coined the terms "occupancy duty" and "activity duty" for this distinction. He cites traces of it in the earlier case law. Professor Newark, by virtue of this article, is one of the earliest writers to perceive and encourage the notion of an "activity duty." His colleague at the Queen's University of Belfast, Professor Montrose, has contributed greatly to the evolution of the notion in a series of very penetrating case notes in the *Modern Law Review*. See notes 98, 103, 104 *supra*, 120, 123, 131 *infra*.

ises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else. The instance was put . . . of the driving of a vehicle, but many others can be imagined. In regard to current operations, the duty of the occupier—or of the person conducting the operations—is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities: and it is the same whether the person injured is an invitee or a licensee, a volunteer or a guest.<sup>119</sup>

Switching off a light while a visitor is leaving may indeed reasonably be called active conduct. It does not, however, set a force in motion but rather creates a dangerous condition. What if the light is switched off half an hour before the visitor arrives? Could an argument still be put that the injury stems from the occupier's activity, or must we then speak in terms of a dangerous condition? How close to the accident in time must the activity be to be regarded as a "current operation"? And should this make a vital difference?

In *Slade v. Battersea & Putney Hospital Management Comm.*,<sup>120</sup> the court was prepared to apply this approach to a plaintiff who slipped on a part of the floor where polish had been applied but not rubbed off. This was an alternative ground of the decision, for the court had previously held that the plaintiff might recover under the classical rules of liability to an invitee or licensee. The judge confessed, however, that the occupancy-activity distinction appealed to him "because it seems to be common sense."<sup>121</sup> Interestingly enough, the court also remarked that "We need not bother ourselves with what might be the position of a trespasser."<sup>122</sup> The dichotomy was again followed by the Court of Appeal in *Slater v. Clay Cross Co.*,<sup>123</sup> where the plaintiff, a licensee by acquiescence, was struck by the defendants' railway train which they operated on their land:

The duty of the occupier is nowadays simply to take reasonable care to see that the premises are reasonably safe for people lawfully coming on to them: and it makes no difference whether they are invitees or licensees. At any rate, the distinction has no relevance to cases such as the present where current operations are being carried out on the land. If a landowner is driving his car down his private drive and meets someone lawfully walking on it, then he is under a duty to take reasonable care so as not to injure the walker; and his duty is the same no matter whether it is his gardener coming up with plants, a tradesman delivering goods, a friend coming to tea, or a flag seller seeking a charitable gift.<sup>124</sup>

119. [1954] 1 Weekly L.R. at 62.

120. [1955] 1 Weekly L.R. 207, [1955] 1 All E.R. 429 (Q.B.), Montrose, *Note*, 18 MODERN L. REV. 395 (1955).

121. [1955] 1 Weekly L.R. at 211.

122. [1955] 1 All E.R. at 431. This sentence does not appear in the version of the judgment given in the *Weekly Law Reports*.

123. [1956] 2 All E.R. 625 (C.A.), Montrose, *Note*, 19 MODERN L. REV. 691 (1956).

124. [1956] 2 All E.R. at 627 (Denning, L.J.).

But earlier in *Slater*, Lord Justice Denning had said: "If she were a trespasser on this railway, she would, of course, have no cause of action . . ."<sup>125</sup> This question of the availability of the activity-duty concept to the trespasser plaintiff was obliquely raised in the 1955 Court of Appeal decision of *Randall v. Tarrant*.<sup>126</sup> There, the plaintiff, after parking his car at the side of a public highway which ran across the defendant's farm land, walked on to the farm. The defendant attempted to drive a baler past the parked car and, in so doing, damaged it. His defense was that the plaintiff had parked the car for the purpose of trespassing on the farm, that this amounted to an improper use of the highway, and that the car was an accessory to the trespass and tainted, as it were, by the same fault. The court held that parking the car for the purpose of trespassing on the defendant's field did not render it a trespasser on the highway; accordingly, judgment was for the plaintiff.

But suppose that the car had been parked for a clearly improper purpose and thereby became a trespasser on the highway. Would this relieve the defendant from his duty to drive past it carefully? The Court of Appeal, observing that no such case had been litigated, declined to express an opinion on the outcome.<sup>127</sup> The facts need be changed only a little to sharpen the issue. Suppose a case, not of damage to property, but of striking a pedestrian on one's driveway.<sup>128</sup> Would it make any difference if the walker was a trespasser?<sup>129</sup> Would it matter if the driver-occupier knew the status of the visitor? Is he relieved from an obligation to drive carefully by that status? With respect to licensee plaintiffs, the passage of the 1957 Occupiers' Liability Act may have made these questions academic, though some English commentators take the view that the act applies only to injuries caused by the static condition of the premises and that actions based on injury caused by activities must still be grounded on the common law.<sup>130</sup> If they are correct, the activity-duty approach no doubt will flourish.

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125. *Id.* at 626.

126. [1955] 1 Weekly L.R. 255 (C.A.), *Montrose, Note*, 18 MODERN L. REV. 395 (1955).

127. [1955] 1 Weekly L.R. at 260.

128. As in the example given by Lord Justice Denning in *Slater v. Clay Cross Co.*, [1956] 2 All E.R. 625, 627 (C.A.), quoted in text accompanying note 124 *supra*.

129. See a query raised by *Montrose, Note*, 17 MODERN L. REV. 265, 267 (1954).

130. 5 & 6 Eliz. 2, c. 31. Section 1(1) of the Act reads: "The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them." (Emphasis added.) Section 1(2) goes on, however, "The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises . . ." (Emphasis added.)

It has been argued that in spite of the language of § 1(1), the scope of the act must be taken to be restricted by the language of § 1(2) to cases of injury caused by defects in the condition of the premises. See *Odgers, Occupiers' Liability: A Further Comment*, CAMB. L.J. 39-40 (1957); *Payne, The Occupiers' Liability Act*, 21 MODERN L. REV. 359, 367-68 (1958). *Contra*, SALMOND, TORTS 481 (12th ed. Heuston 1957).

The distinctions between occupier and nonoccupier defendants and between occupancy and activity duties have recently been confirmed and illustrated by a leading decision of the House of Lords—*A. C. Billings & Sons v. Riden*.<sup>131</sup> The defendants were contractors who had been engaged by the occupiers of premises to remodel an entrance to a private home. The work made access to the premises impossible except by passing through the forecourt of the house next door and stepping up some three feet from there onto a ramp. The plaintiff, a social visitor to the caretaker of the house under repair, gained access to the premises safely but, on leaving after dark, fell into a sunken area of the adjacent house and sustained injuries. The defendants were found liable, but with damages reduced by one half due to the plaintiff's contributory negligence.<sup>132</sup> That a plaintiff who was clearly a licensee should recover under English law for a danger obvious to her is in itself surprising, though the ground for the decision is not clear. In the Court of Appeal, the majority opinion had clearly rested on the theory that a general duty of care must govern those who conduct activities on land:

The duty of care . . . rests on anyone who does work on the land, including the occupier himself. If the occupier does work on his own land, he is under the same duty as a contractor. The reason is because the duty arises, not out of the fact of occupation, but out of the fact that he is doing work which he knows or ought to know may bring danger to others; and that gives rise to a duty of care . . .<sup>133</sup>

In the House of Lords, on the other hand, Lord Reid seemed to rest his opinion on the fact that the defendants were not the occupiers of the premises:

The only reasonable justification I know of for the rights of a licensee being limited as they are is that a licensee generally gives no consideration for the rights which the occupier has given him and must not be allowed to look a gift horse in the mouth. That cannot apply to the appellants, who gave no concession to the respondent. . . . In the present case I see no reason why the contractor who chooses to prevent safe access by visitors should be entitled to rely on any speciality in the law of licensor and licensee.<sup>134</sup>

Lord Somervell, however, followed the approach of Lord Justice Denning in the Court of Appeal and advanced the general duty of care owed by a

131. [1958] A.C. 240 (1957), *affirming* [1957] 1 Q.B. 46 (C.A. 1956). See Montrose, *Note*, 20 MODERN L. REV. 287 (1957) (on Court of Appeal decision); Montrose, *Note*, 21 MODERN L. REV. 76 (1958) (on House of Lords decision).

132. The principle of apportionment of damages was generally introduced into the English law of tort by the Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28.

133. [1957] 1 Q.B. at 56 (opinion of Denning, L.J.).

134. [1958] A.C. at 249-50. And, in the Court of Appeal, Lord Justice Denning had felt it necessary to remark, "At the outset I desire to stress that we are not concerned here with the liability of an occupier of land but with the liability of a contractor who is doing work on land." [1957] 1 Q.B. at 55.

person executing work on premises.<sup>135</sup> In turn, Lord Keith was troubled about the exact location of the plaintiff when she sustained the injury. If the accident started on the premises on which the defendants were working, he agreed that the plaintiff could recover; but if the accident started next door, the plaintiff, being a trespasser there, could not recover against the defendants:

The trespass was insignificant and certainly excusable. But I cannot see how the contractors' men, assuming they advised or encouraged the trespass, are in any different position from the plaintiff. If a person encourages a trespass and another person accepts the encouragement, both being aware of the position, and the actual trespasser is injured by some danger on the land trespassed on, known to both, there is no principle I know of which would attach liability to the instigator or encourager in a question with the trespasser . . .<sup>136</sup>

Since he was willing to assume that the accident had begun on the premises where the defendants were working, Lord Keith joined in the judgment for the plaintiff.

### Summary

Apart from the statutory innovation of the Occupiers' Liability Act, two judicial tendencies appear to be working toward improving the position of the trespasser plaintiff in English law. First is the denial to nonoccupier defendants of the immunities enjoyed by the occupier, as in *Buckland v. Guildford Gas Light & Coke Co.*,<sup>137</sup> *Davis v. St. Mary's Demolition & Excavation Co.*<sup>138</sup> and *Creed v. McGeoch*.<sup>139</sup> With a broad interpretation of the notion of activity, these cases could all be rested on the theory of activity duty. Nevertheless, they were not.

Second, the notion of activity duty as opposed to occupancy duty is gaining currency. So far, it has been squarely applied only to cases of plaintiffs lawfully on the premises, as in *Dunster v. Abbott*,<sup>140</sup> *Slade v. Battersea & Putney Hospital Management Comm.*<sup>141</sup> and *Slater v. Clay Cross Co.*<sup>142</sup> But in *A. C. Billings & Sons v. Riden*,<sup>143</sup> the plaintiff clearly was a technical

135. [1958] A.C. at 263-66.

136. [1958] A.C. at 262.

137. [1949] 1 K.B. 410 (K.B. 1948), discussed in text accompanying note 106 *supra*.

138. [1954] 1 Weekly L.R. 592 (Q.B. 1953), discussed in text accompanying notes 107-08 *supra*.

139. [1955] 1 Weekly L.R. 1005 (Liverpool Assizes), discussed in text accompanying notes 109-10 *supra*.

140. [1954] 1 Weekly L.R. 58 (C.A. 1953), discussed in text accompanying notes 118-19 *supra*.

141. [1955] 1 Weekly L.R. 207 (Q.B.), discussed in text accompanying notes 120-22 *supra*.

142. [1956] 2 All E.R. 625 (C.A.), discussed in text accompanying notes 123-24 *supra*.

143. [1958] A.C. 240 (1957), discussed in text accompanying notes 131-36 *supra*.

trespasser at some point in the period of time surrounding the accident, yet she recovered.

The situation was much the same in *Randall v. Tarrant*<sup>144</sup> and *Farrugia v. Great Western Ry.*<sup>145</sup> It is important to note that in the first two cases the plaintiffs were adults. The picture is complicated, however, by the possibility that *A. C. Billings & Sons v. Riden* rests on the fact that the defendant was not the occupier.

The distinctions between occupier and nonoccupier and between occupancy and activity duties alleviate the doctrinal obstacles which impede recovery for the trespasser plaintiff, though it will be suggested that they are not the most rational or efficient techniques for accomplishing this result. At the same time, it must not be thought that the trend in England is one of uniform liberalization. Where the new distinctions are not applicable the harsh or mechanical decision still occurs to demonstrate the inadequacy of the new approaches.<sup>146</sup>

#### SELECTED COMMONWEALTH JURISDICTIONS

##### *Canada*

On the whole, the Canadian provinces have not looked with much favor upon tendencies to enlarge the trespasser's right of recovery. Instead, they have adhered to the narrow formula expressed by Lord Hailsham in *Addie v. Dumbreck*.<sup>147</sup> Thus, Ontario's law on liability to trespassers was stated as follows in a 1943 opinion: "While it is clear that the owner of land cannot change the condition of his premises so as to cause injury to the trespasser after he knows the trespasser is there, without proper notice of the change

144. [1955] 1 Weekly L.R. 255 (C.A.), discussed in text accompanying notes 126-27 *supra*.

145. [1947] 2 All E.R. 565 (C.A.), discussed in text accompanying notes 115-16 *supra*.

146. Examples of such decisions are: *Adams v. Naylor*, [1944] K.B. 750 (C.A.) (denying recovery to child injured while trying to retrieve ball from mine field where fence and warning notice were submerged by drifting sand), *aff'd*, [1946] A.C. 543 (holding that the plaintiff had suffered "war injuries" and therefore no civil action lay); *Sullivan v. Lipton*, [1955] CURRENT LAW YEARBOOK § 1789 (Q.B.) (child denied recovery for injury sustained when another child threw container of sulphuric acid in garden of unoccupied house, although children had been injured in this way on two previous occasions); *Phipps v. Rochester Corp.*, [1955] 1 Q.B. 450 (1954) (boy of five denied recovery for injury sustained by falling into trench which defendants left open on land where they knew children played; the opinion of Mr. Justice Devlin contains a full and discerning review of the authorities, but ends, it is submitted, with a harsh adjudication). The Scottish courts have recently rejected the English distinction between occupancy duty and activity duty, reaffirmed the sanctity of the propositions in *Addie v. Dumbreck* and rejected the notion of applying special rules to children. *Murdoch v. A. & R. Scott*, [1956] Sess. Cas. 309 (Scot. 2d Div.).

147. See text accompanying note 83 *supra*. The Canadian decisions up to 1929 are summarized and discussed in MacDonald, *Liability of Possessors of Premises*, 7 CAN. B. REV. 665 (1929); MacDonald, *Child Trespassers*, 8 CAN. B. REV. 1 (1930).

to the party trespassing, the trespasser must take the premises as he finds them and the sole duty of the occupier is not to change the condition of the premises to his disadvantage."<sup>148</sup> And the courts of Ontario have recently indicated that this branch of the law is still dominated by the categories of invitee, licensee and trespasser.<sup>149</sup>

This simple affirmation of the English doctrine of three decades ago has often led to harsh results in Canadian decisions. For instance, a seaman who lost his way in a dense fog and drove off the edge of a wharf has been denied recovery because a trespasser.<sup>150</sup> So has a plaintiff who stepped on the defendant's land to retrieve a parcel which he had dropped when walking on the highway in the dark.<sup>151</sup> Child plaintiffs also are treated with less solicitude than in other jurisdictions. The burden of showing that a child has become a licensee through the inactivity of the occupiers is a very heavy one in Canada,<sup>152</sup> and the doctrine of "attractive nuisance," though recognized, is sparingly applied.<sup>153</sup> An open door in the street leading to an un-

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148. *Tolfree v. Russel & Jennings & Toronto*, [1942] Ont. 724, 728, [1943] 2 D.L.R. 234, 245 (C.A. 1937); see *King v. Northern Nav. Co.*, 27 Ont. L.R. 79, 6 D.L.R. 69 (C.A. 1912); *Canadian Nat'l Rys. v. Lancia*, [1949] Can. Sup. Ct. 177, [1949] 1 D.L.R. 737. In a case where the defendant breached a statutory duty by failing to maintain a bridge in a safe condition, the plaintiff was held to be a trespasser on the highway when he drove over the bridge in a truck loaded beyond the statutory maximum. The defendant's only duty was not to set a trap for the plaintiff. But it was held that the unsafe condition of the bridge constituted a trap and the plaintiff was allowed to recover. *Atwood v. Municipal Dist. of Cochrane*, [1949] 1 West. Weekly R. (n.s.) 858 (Alberta Dist. Ct.). Assuming that the overloading of the truck was in no way the cause of the accident, are we to assume that there might be circumstances in which the condition of the bridge, while unsafe, would not constitute a trap, so that the driver of an overloaded truck could not recover? Such a holding could only be justified by a retributive argument based on the plaintiff's outlaw status.

149. *White v. Imperial Optical Co.*, [1957] Ont. Weekly N. 192, 7 D.L.R.2d 471 (C.A.).

150. *Canadian Pac. Ry. v. McCrindle*, [1956] Can. Sup. Ct. 473, 2 D.L.R.2d 449. He was a trespasser, since he was outside the area necessary to approach his ship. The jury had found for the plaintiff, but with a finding of contributory negligence. The Court of Appeal of British Columbia affirmed the verdict, holding the deceased to have been a licensee. The Supreme Court of Canada reversed, stating that there was no evidence that he was a licensee.

151. *Barrow v. Watkins*, [1934] Ont. Weekly N. 221 (C.A.). The plaintiff fell into an uncovered opening on the defendant's land, about 4'4" from the highway. The Court of Appeals treated the plaintiff as a deliberate trespasser and held that the opening was not adjacent to the highway.

152. *Pianosi v. Canadian Nat'l Rys.*, [1943] Ont. Weekly N. 766, [1944] 1 D.L.R. 161 (C.A. 1943). A somewhat broader statement of the duty to licensees than the traditional notion of giving warning of concealed dangers is to be found in the Supreme Court of Canada decision of *Booth v. St. Catharines*, [1948] Can. Sup. Ct. 564, [1948] 4 D.L.R. 686.

153. *Ottawa v. Munroe*, [1956] Can. Sup. Ct. 756, [1955] 1 D.L.R. 465 (1954). This case of the child of an apartment house tenant injured in the apartment house washroom is a good example of a narrow and mechanical application of the categories of liability.



finished building has been held not to be an allurement to an eleven-year-old boy,<sup>154</sup> and a child who had been taken by her father for a truck ride to premises where he had business was held to be a trespasser there and unable to recover for injuries sustained.<sup>155</sup> In another case, the child plaintiff, while trespassing on the defendants' right of way, was carrying a steel fishing rod which touched power lines suspended ten feet above the ground. In spite of the jury's finding that the defendants were negligent in having their power lines so close to the ground, the Supreme Court of Canada held that the plaintiff could not recover: "The finding of the jury that the defendants were negligent . . . if it implies negligence quoad the plaintiff, cannot be supported on the evidence. They owed no duty to the plaintiff."<sup>156</sup>

In *Koehler v. Pentecostal Assemblies of Canada*<sup>157</sup> a child trespasser was burnt by treading on hot ashes which the defendants had spread on their land. At the trial plaintiff argued that general principles of negligence were applicable, but this position was rejected by the court. The judge took the view that the well-settled categories of liability should not be lightly disturbed. The general negligence approach, the court felt, might sometimes be relevant but not in a case (such as this) where the defendants were the occupiers of the land.<sup>158</sup>

A further example of the strictness of Canadian rules is furnished by *Riopelle v. Desjardins*,<sup>159</sup> in which the defendants' workmen, while excavating

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A stimulating discussion of it is to be found in Jeffrey, *Accidents to Children*, 31 AUSTR. L.J. 442 (1957). Other cases illustrating the posture adopted towards child plaintiffs are *Pedlar v. Toronto Power Co.*, 29 Ont. L.R. 527, 15 D.L.R. 684 (1913), *aff'd*, 30 Ont. L.R. 581, 19 D.L.R. 441 (1914); *Robinson v. Village of Havelock*, 32 Ont. L.R. 25, 20 D.L.R. 537 (C.A. 1914); *Craig v. Canadian No. Pac. Ry.*, 47 B.C. 453 (1933); *Desjardins v. Gatineau Power Co.*, 74 Que. C.S. 205, [1936] 3 D.L.R. 338; *Haines v. Brewster*, [1938] 2 West. Weekly R. 285, [1938] 3 D.L.R. 246 (Alberta); *Canadian Pac. Ry. v. Kizlyk*, [1944] Can. Sup. Ct. 98, [1944] 2 D.L.R. 81, Note, 22 CAN. B. REV. 549. In *Kizlyk* the plaintiff was a child attending a rural school held in a converted railway car on the defendant's siding. Other cars were nearby on the tracks. The plaintiff, a twelve-year-old girl, was killed while passing between two cars, ninety feet away from the school car, when they were being pulled together. At the trial the defendants were allowed to withdraw on the ground that the plaintiff was a trespasser. The majority of the Manitoba Court of Appeal ordered a new trial and the order was sustained in the Supreme Court of Canada by a three-to-two majority on the ground that the question of whether or not the plaintiff was a trespasser should have been left to the jury. The opinion of Justice of Appeal Davis in the Supreme Court of Canada took notice of and approved § 334 of the *American Restatement of Torts*, which proposes liability where the occupier knows or should know that trespassers constantly intrude on a limited area of his land and he carries on an activity involving risk of death or serious bodily harm without reasonable care for their safety.

154. *Wallace v. Pettit*, 55 Ont. L.R. 82 (C.A. 1923).

155. *Bettles v. Canadian Nat'l Rys.*, 64 Ont. L.R. 211, [1929] 4 D.L.R. 175 (C.A.).

156. *Sale v. East Kootenay Power Co.*, [1931] Can. Sup. Ct. 712, [1931] 4 D.L.R. 593, 594 (opinion of Anglin, C.J.).

157. 7 D.L.R.2d 616 (B.C. 1957).

158. *Id.* at 624

159. [1950] Ont. L.R. 93 (1949).

a trench on the defendants' premises, saw children about but did not warn them off. The children climbed down into the trench, where one of them was killed when a huge stone fell. The defendants were exonerated on the ground that the child was a trespasser. The workmen's acquiescence in his presence could not convert him into a licensee, since they were not in a position of authority under the occupier.<sup>160</sup>

Perhaps one may interpret this reasoning as a manifestation of the toughness and brashness of an expanding frontier community, where the paternalistic welfare yearnings of more settled societies have not yet been felt with any force. Whatever the reason, the Canadian courts do not suffer child trespassers to come to them with great hopes of success. The general picture is simple and strict. Even here, however, one or two strands of mitigating doctrine may be detected.

While the distinction between the occupier and the nonoccupier defendant has not emerged in Canada with anything like the clarity with which it may be seen in England, the trend is nevertheless faintly perceptible. In *Koehler v. Pentecostal Assemblies*,<sup>161</sup> the court was willing to concede that general principles of negligence may be applicable when the defendant is not the occupier. The point was also made in *Coburn v. Saskatoon*,<sup>162</sup> where the plaintiff, a trespasser on a railroad track, was injured by the fall of an overhead municipal bridge. The trial judge granted a nonsuit on the ground that the plaintiff was a trespasser. But the Saskatchewan Court of Appeal took the view that the plaintiff's trespasser status was a defense available only to the occupiers of the tracks and ordered a new trial. The same approach—reserving the defenses which refer to the plaintiff's status to occupier defendants—was taken by the British Columbia court in *Laverdure v. City of Victoria*, in which the plaintiff was a child licensee.<sup>163</sup>

A line of cases in British Columbia demonstrates a more vigorous awareness of possible radical approaches in this area. Justice of Appeal O'Halloran of the court of appeal there has waged an extended and notable campaign for the introduction of general negligence considerations. Dissenting in *Power v. Hughes*,<sup>164</sup> he attacked the conventional discrimination between invitees and licensees, and urged the court to impose a common duty of care along the lines of the *Donoghue v. Stevenson* doctrine.<sup>165</sup> In this, he anticipated both the views expressed by Lord Justice Denning in *Dunster v. Abbott*,<sup>166</sup> and the passage of the English Occupiers' Liability Act. He returned to the point in his concurring opinion in *Kennedy v. Union Estates Ltd.*: "[I]n

160. *Id.* at 97.

161. *Supra* note 157.

162. [1935] 1 West. Weekly R. 392, [1935] 2 D.L.R. 810 (Sask. C.A.).

163. 7 West. Weekly R. (n.s.) 333 (B.C. 1952) (plaintiff fell into a trench dug by defendants who were not the occupiers).

164. [1938] 2 West. Weekly R. 359, 53 B.C. 64, [1938] 4 D.L.R. 136 (C.A.).

165. *Supra* note 112.

166. Text accompanying note 119 *supra*.

weighing the relationship between the parties in the particular case, the search for the duty should not be halted by the ready appearance of what at first appears to be a convenient category; nor should the main problem of negligence be obscured in an effort to place the injured person in a rigid and exclusive category."<sup>167</sup>

Justice of Appeal O'Halloran made his strongest contribution in *Crewe v. North American Life Assurance Co.*<sup>168</sup> In that case, the plaintiff, who worked for a contracting firm engaged by the defendants to maintain some neon signs on the roof of their building, used the fire escape to gain access to the roof. This practice was a breach of a statutory regulation, but the defendants had neither objected to it nor offered an alternative means of ascent, though alternative routes were available. A majority of the British Columbia Court of Appeal held that the plaintiff became a trespasser through his use of an unlawful means to reach the roof. Consequently, he was unable to recover for injuries sustained when the fire escape collapsed. Dissenting, Justice of Appeal O'Halloran said that, on all the facts of the case, the defendants owed a duty of care to the plaintiff:

It may be a common tendency to attempt classification of the various human relationships which may give rise to a breach of duty. But . . . such classifications cannot be final. They cannot be set up as inflexible yard-sticks but must be regarded rather as convenient instruments fashioned and refashioned from time to time in the judicial workshops, to record and harmonize the relationship between the law and altering social and business conditions and outlooks. The standard of duty must be deduced from the facts in the particular case at the particular time.<sup>169</sup>

This vigorous dissent from what must be regarded as a bad and mechanical decision discloses that the general negligence approach is at least an object of discussion in Canada.

Moreover, it is an approach which seems to have triumphed, at least obliquely, in the earlier British Columbia Court of Appeal decision, *Hiatt v. Zien*.<sup>170</sup> There, the defendants occupied a vacant lot which was habitually used by truck drivers to gain access to another building. So using the lot, the plaintiff was injured by a car carelessly driven by a servant of the defendant. The trial judge had held that the defendants would be liable whether the plaintiff were a licensee or a trespasser. In the court of appeal, the justices were inclined to regard the plaintiff as a licensee and to base liability on this ground, but the opinion contains remarks of special interest:

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167. 55 B.C. 1, [1940] 1 D.L.R. 662, 672 (C.A.), *aff'd*, [1940] Can. Sup. Ct. 625, [1940] 3 D.L.R. 404.

168. 58 B.C. 103, [1942] 4 D.L.R. 75 (C.A.).

169. *Id.* at 127, [1942] 4 D.L.R. at 91-92. See also Justice of Appeal O'Halloran's dissent in *Ingle & Ingle v. Hanson*, 63 B.C. 481 (C.A. 1947).

170. 54 B.C. 450, [1940] 1 D.L.R. 736 (C.A. 1939); see Wright, *Note*, 17 CAN. B. REV. 445 (1939).

Assuming, however, contrary to the view expressed, that respondent was a trespasser, the trial judge would still hold appellants responsible for the accident. May one place a motor car in motion either way without first ascertaining that no one, whether a trespasser or not is in his way? Is it a comprehensive and satisfactory statement to say that there must be a deliberate intention to do harm to the trespasser—a malicious act, or is reckless disregard of the consequences enough? . . . It may be that humanitarian considerations are at least as important as property rights and that where danger of life or limb is involved the responsibility of the occupier may not be less because of the status of the victim.

Again is it necessary that the occupier must know that the trespasser is before him or behind him, or is it enough that he ought to know having regard to modern conditions and density of population? These may be questions for later determination.<sup>171</sup>

These seeds of liberality in the Canadian cases may sprout into a more general recognition of a duty to take care when engaged in active operations. The recent Manitoba decision of *Lengyel v. Manitoba Power Comm'n* perhaps augurs such a trend.<sup>172</sup> There, the defendants erected a "portable sub-station" in a ditch alongside a highway. The structure was marked simply by a red flag and was protected by a climbable fence.

The child plaintiff climbed the fence and was severely injured. In holding the defendants liable, the court stressed the general dangers of erecting such structures near the highway without full measures of protection and warning. To regard this case as one of a trespasser plaintiff and occupier defendant would be, the court felt, an unjustifiable extension of immunities. To establish liability, in the court's view, it was not even necessary for the plaintiff to offer proof that the vicinity of the structure was frequented by children.<sup>173</sup>

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171. 58 B.C. 451-52, [1940] 1 D.L.R. at 738-39. The trial judge had relied on the English authority of *Mourton v. Poulter*, [1930] 2 K.B. 183 (C.A.), which was decided on the principle of liability to a trespasser for introducing a fresh danger on to the land with knowledge of the trespasser's presence.

172. 23 West. Weekly R. (n.s.) 497, 12 D.L.R.2d 126 (Man. C.A. 1957).

173. This case was to some extent anticipated by the Supreme Court of Canada decision in *Bouvier v. Fee*, [1932] Can. Sup. Ct. 118, [1932] 2 D.L.R. 424 (1931), allowing recovery to a child who touched a cement mixer which defendants were operating on a vacant lot close to a public lane. These cases are understandable as an extension of the well established principle of liability in English law for defendants who leave dangerous allurements on the highway. *Lynch v. Nurdin*, 1 Q.B. 29, 113 Eng. Rep. 1041 (1841). They may be compared with *Schoeni v. King*, [1944] Ont. L.R. 38, [1944] 1 D.L.R. 326 (C.A. 1943). There contractors working for the defendant were using a box of mortar which rested partly on the highway. They had also put down a sand pile on the highway. The plaintiff was a child of four who played in the sand, fell into the mortar box and was burned by the lime in it. The trial judge held that if the plaintiff fell into the part of the box which was resting on the highway he could recover, but that if he fell into that part of the box which rested on the defendant's premises different considerations would apply. [1943] 4 D.L.R. 536, 539. Fortunately, the judge was able to hold that the plaintiff was injured on the highway and the action succeeded. The decision was

This decision, which may be compared with *Buckland v. Guildford Gas Light & Coke Co.*<sup>174</sup> in England and with *Thompson v. Bankstown*<sup>175</sup> in Australia, is an encouraging advance. It must not, of course, be taken as heralding a general application of negligence theory in Canada, since the special features of ultrahazardous potentiality and proximity to the highway will probably be regarded as limiting its scope.

### *Australia*

Although the courts of Australia and New Zealand largely follow English precedent in this field, independently significant decisions and appraisals have recently been reported in both jurisdictions.

The duty of the occupier of premises towards a trespasser was stated in conventionally narrow terms by Justice Herron in the New South Wales case of *Vale v. Whiddon*.<sup>176</sup> "Subject to one qualification, the occupier owes no duty at all to a trespasser as to the condition of the premises. A person trespasses at his own risk and cannot complain of any injury he may receive through the premises being dangerous or unsafe. The qualification is that the occupier must not deliberately injure the trespasser."

This statement of the occupier's position seems to eliminate liability even for reckless conduct towards the known trespasser, and the leading Australian text on the law of torts takes the view that an occupier may stand by and fail to warn a trespasser of an impending danger.<sup>177</sup> This very restricted view of the duty is, however, clearly confined to the case of the plaintiff who sues the occupier for injuries caused by defects in the premises. The Australian courts have come to recognize the concept of activity duty and have moved further in this direction than have the courts in England. The topic is considered and surveyed in the centrally important decision of *Thompson v. Bankstown*.<sup>178</sup>

In this case, the defendant maintained a series of wooden poles carrying high tension cables on a public road. A ground wire ran down one of the poles to within three feet of the earth and the staples securing this wire had decayed. The plaintiff was a boy of thirteen who attempted to reach a bird's

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affirmed by the Court of Appeal. The outcome of the case, though fortunate, is surely based on ridiculous reasoning.

174. [1949] 1 K.B. 410 (1948), *supra* note 102.

175. 87 Commw. L.R. 619, [1953] Argus L.R. 165 (Austl.), *infra* note 178.

176. 50 N.S.W. St. 90, 105 (1949).

177. FLEMING, TORTS 464 (1957). But this observation is probably meant as a special reference to the occupier's absence of a duty to take active steps to protect a trespasser. Broader statements of the general duty with respect to a trespasser may be found in such Australian decisions as *Rodgers v. J.B. Zander Pty. Ltd.*, [1921] Vict. L.R. 103, 109, 27 Argus L.R. 59, 62 (1920), where Justice Cussen stated that an occupier might be liable to a trespasser "for wilful harm, or for harm inflicted by want of reasonable care after knowledge of the special danger."

178. *Thompson v. The Council of the Municipality of Bankstown*, 87 Commw. L.R. 619, [1953] Argus L.R. 165 (Austl.).

nest lodged in the pole by standing on a bicycle. He touched the ground wire and received an electric shock when it came into contact with the bicycle. Restoring a verdict for the plaintiff, the High Court of Australia referred to the difficulty of "choosing between two competing categories of the law of torts."<sup>179</sup> The competing categories were the general principles of negligence and the restricted duties owed by an occupier of land with respect to structures he controls. The Supreme Court of New South Wales had treated the case as one to be governed by the second category, and accordingly, had found for the defendant on the ground that the plaintiff was a trespasser.<sup>180</sup> The justices of the High Court were disposed rather to decide the matter on negligence principles.

[T]his is not a case to be dealt with as depending upon the duties of a person in control or occupation of a "structure" or "premises" towards a person coming upon them. The law which . . . should be applied . . . is that which imposes a duty of care upon those carrying on . . . the employment of a highly dangerous agency. No doubt the question still is whether the plaintiff qualified as a person entitled to recover for the consequences to him of a failure to take proper care in the use and control of a dangerous agency and this may depend upon the definition of the duty, or of the measure of care. But this distinction upon which . . . this case turns does not for that reason lose importance. The point is that the defendant's responsibility to the plaintiff does not depend on the defendant's control or "occupation" of the pole or the character the plaintiff assumed in reference to the pole when he placed his bicycle against it, leaned his body upon it and put his arms around it or, if that be what he did, when he grasped the wire. It is a mistake to treat the question as if it was: did the plaintiff's touching of the post, his propping the bicycle and leaning his body upon it, putting his arms against it, constitute a "trespass" so that if he had damaged the pole, he might have been liable for the damage? A man or child may be infringing upon another's possession of land or goods at the time he is injured and it will be no bar to his recovery, if otherwise he can make out the constituent elements of a cause of action.<sup>181</sup>

This is a case in which the defendant was clearly the occupier of the structure and in which the plaintiff was just as clearly a trespasser, yet the plaintiff succeeded. It might be possible to regard the decision as an extension of the "activity duty" approach to the case of a trespassing plaintiff. But, in fact, the judgments of the High Court seem to go even further than that. For the opinions lay no particular stress on the distinction between a structural defect and the conduct of an activity. They seem content to assert that circumstances may determine that a duty to take care exists, and do not seek to confine the nature of those circumstances within the notion of "activity duty." "The true question, as we think, is whether the plaintiff acting as he did falls

179. 87 Commw. L.R. at 623, [1953] Argus L.R. at 166.

180. The decision of the Supreme Court of New South Wales is reported in 69 Weekly N. 64 (N.S.W. 1952).

181. 87 Commw. L.R. at 628, [1953] Argus L.R. at 169-70.

within the scope of the defendant's duty of care."<sup>182</sup> "It would be a misconception of the rule [*i.e.*, the rule limiting occupier's liability] to regard it as precluding the application of the general principle of *M'Alister* (or *Donoghue*) v. *Stevenson* to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord *Atkin*'s sense of the word . . . ."<sup>183</sup>

Of course, the most obvious circumstance that might make the trespasser a "neighbour," thereby imposing a duty of care on the occupier, would be the conduct of a hazardous operation on the premises by the occupier. But other circumstances are conceivable which could, under this approach, support an argument that the occupier owes a duty of care even with respect to structural defects. The decision thus seems to be a theoretical advance on the position obtaining in England.<sup>184</sup>

### *New Zealand*

The merits of the Australian High Court's approach may be illustrated by comparing the *Thompson* case with the 1954 decision of the Supreme Court of New Zealand in *Napier v. Ryan*.<sup>185</sup> In that case, the plaintiff, a boy of thirteen, was injured when his foot was caught in the crown wheel and pinion of a carousel owned by the defendant Ryan, who was acting under a contract with the local Returned Services Association (the other defendants in the action). Upon leaving the premises for the night, Ryan secured the machine, but unauthorized persons released it. The plaintiff was injured while playing on it with other children who started up the machinery. The jury found that the condition of the machinery constituted a concealed danger, and that the premises were occupied both by Ryan and the Returned Services Association. But the question whether the premises at the time of the accident were under the control of the Association or Ryan was not answered.

The Chief Justice, under his powers of answering questions of fact not covered by the jury, held that the premises were under the control of both defendants. Since the defendants were in occupation and control, the court felt that the strict rules of occupiers' liability applied and the action must fail. The judgment turns largely on the question of whether the child was a licensee by acquiescence (the court held that he was not), and on whether the

182. *Id.* at 630, [1953] Argus L.R. at 171.

183. *Id.* at 642-43, [1953] Argus L.R. at 179 (Kitto, J.). The statement of doctrine here was reiterated by Justice Taylor in the High Court decision of *Commissioner for Rys. v. Hooper*, 89 Commw. L.R. 486, 504 (Austl. 1953): "[I]t is clear that circumstances may arise, unrelated to questions of the safety of the occupied premises, in which the obligations of the occupier for both negligent acts of commission and omission fall to be determined in accordance with the general principles of liability for negligence."

184. This is the view taken by Jeffrey, who discusses the case in his valuable article, *Accidents to Children*, 31 *Austl. L.J.* 442 (1957).

185. [1954] N.Z.L.R. 1234, 8 N.Z. Local Gov. R. 377.

defendants were in occupation and control. The court professed to follow the distinction between the liability of occupiers and nonoccupiers outlined in the English cases discussed earlier.<sup>186</sup> Counsel for the plaintiff wished to submit the case under the general principles of negligence, but this submission was not favorably received; the judgment contains no reference to the notion of "activity duty" and, surprisingly, no reference to the decision of the High Court of Australia in *Thompson v. Bankstown*.<sup>187</sup>

The New Zealand Court of Appeal heard much fuller argument with respect to the applicability of general principles of negligence in the case of *Perkowski v. Wellington City Corp.* in 1956.<sup>188</sup> There, the deceased was a licensee who had used a diving board in a public pleasure ground established by the defendants. Diving from the board was dangerous at low tide, but the defendants had posted no warning. The deceased having been killed when he dove into shallow water, the jury found that, although the board did not constitute a concealed danger, the defendants had been negligent in not posting a warning. The argument by counsel for the plaintiff ably and fully reviewed the English and Australian decisions on the notion of activity duty, but the court said that, though the principle of activity duty was now a part of the law, it had no application to the facts of the case.<sup>189</sup> The decision, surely a harsh one to the licensee plaintiff, is a rather vivid illustration of the weakness of the distinction between "occupancy duty" and "activity duty."

#### FRANCE

Any attempt to expound the French law on liability to trespassers would be unprofitable without first offering at least a thumbnail sketch of the general structure of delictual liability in French civil law.<sup>190</sup> This legal system

186. See text accompanying notes 102-12 *supra*.

187. The decision of the New Zealand Supreme Court is considered and criticized in Davis, *Liability for Dangerous Premises*, 32 N.Z.L.J. 135 (1956).

188. [1957] N.Z.L.R. 39 (C.A. 1956).

189. I conclude, therefore, that, though an occupier may owe to visitors on his premises duties which are in addition to what I have called the occupier's duty, and though, in particular, he may owe the duty which is defined in *Donoghue v. Stevenson*, that latter duty has no relation to injuries which result only from the dangerous condition of the premises . . . . In the present case, if the Corporation be held to be the occupier of the spring-board, I can find no evidence which could give rise to the duty for which the appellant contends.

[1957] N.Z.L.R. at 60-61 (opinion of Barrowclough, C.J.).

190. Helpful accounts are to be found in VON MEHREN, *THE CIVIL LAW SYSTEM: CASES AND MATERIALS* 339-414 (1957) [hereinafter cited as VON MEHREN]; LAWSON, *NEGLIGENCE IN THE CIVIL LAW* *passim* (1950); AMOS & WALTON, *INTRODUCTION TO FRENCH LAW* 211-57 (1935); DAVID & DE VRIES, *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION TO CIVIL LAW SYSTEMS* *passim* (1958); LAWSON, *The Duty of Care in Negligence: A Comparative Study*, 22 TUL. L. REV. 111 (1947); LEE, *Torts and Delicts: A Comparative View of French and English Law*, 27 YALE L.J. 721 (1918); MARSH, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV.



presents a method of approach to questions of liability totally removed from the common-law tradition of slow-maturing, nominate torts. The Civil Code offers no more than a few sweepingly assertive propositions (articles 1382-86), out of which have been spun, by the decisions of the courts (*la jurisprudence*) and the writings of the jurists (*la doctrine*), the whole web of French tort law.

Article 1382 is the enunciation of fault as a foundation of liability. Widely copied and imitated, it proclaims: "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."<sup>191</sup> This notion of fault is elaborated by article 1383: "Everyone is liable for the damage he causes not only by his acts but also by his negligence or imprudence."<sup>192</sup>

The framers of the Code went on to supplement these simple declarations as to fault with somewhat more specific references to certain situations. So, part of article 1384 reads:

A person is liable not only for the damage he causes by his own act but also for that caused by the acts of persons for whom he is responsible or by things that he has under his guard.

Masters and employers are liable for the damage caused by their servants and employees in the exercise of the functions for which they have been employed.<sup>193</sup>

And article 1386 runs:

The owner of a building is responsible for the damage caused by its collapse [*ruine*] when this has taken place because the building was not maintained properly [*défaut d'entretien*] or because it was badly constructed [*par le vice de sa construction*].<sup>194</sup>

These materials are clean and simple, and with them French jurists have raised an impressive structure. For nearly a century after the passage of the

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359, 386-87 (1953); Walton, *Liability for Damage Done by Inanimate Things*, 49 JURID. REV. 359 (1937); Walton, *Delictual Responsibility in the Modern Civil Law*, 49 L.Q. REV. 70 (1933); Book Review, *Torts Under the French Law*, 8 AM. L. REV. 508 (1874). Excerpts from many of the leading French decisions may be found in VON MEHREN and in LAWSON, *op. cit. supra*.

191. The translation of the relevant articles of the Civil Code is taken here from VON MEHREN 339-40.

192. The concept of *fait* in article 1382 is equivalent to that of intentional (delictual) inflictions of harm. Article 1383 thus extends the notion of fault by indicating that it also embraces negligent (quasi-delictual) conduct. 1 MAZEAUD, MAZEAUD & TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE* 56-57 (5th ed. 1958) [hereinafter cited as MAZEAUD].

193. The portions of article 1384 relating to the liability of parents and of teachers and artisans and the 1922 and 1937 amendments have been omitted inasmuch as they are not relevant to the present discussion. For the complete text of article 1384, see DALLOZ, *CODE CIVIL* 532 (1958).

194. Article 1385, which has been omitted here, deals with liability for injuries caused by animals. For a translation, see VON MEHREN 340.

Civil Code in 1804, the French law of civil responsibility rested on the pervasive notion of fault, as expressed in articles 1382 and 1383. But with the coming of the Industrial Revolution, the solvent powers of this queen of concepts waned. The toll levied by industrial enterprises on their weakest participants often made the burden of proving fault an intolerable one. As one commentator puts it: "To make the liability of . . . [the industrialist] depend on proof that he was at fault would be to condemn the workman to bear alone the risk of injury from those powerful forces that worked for the profit of his employer."<sup>195</sup>

As a result, the French courts in the late nineteenth century were casting around for a method of extracting some notions of presumption of fault or strict liability from the simple precepts of the Civil Code. An attempt was made to enlarge the scope of article 1386, which refers to the collapse of buildings. This article placed the plaintiff in a slightly better position than did article 1382, for, under 1386, lack of fault would be no defense to the owner of a building, once the plaintiff had shown the requisite reason for its collapse. There are decisions at this time which apply article 1386 to the fall of a tree,<sup>196</sup> and, most significantly, to the breakdown of a machine in a factory.<sup>197</sup> But such artificial aggrandizing of article 1386 could scarcely provide an adequate remedy. There are limits beyond which the concept of a "building" cannot with any decency be pushed, and, in any case, 1386 did not give enough help to the plaintiff. The onerous burden of proving a defect of construction or inadequate maintenance remained upon him.

The breakthrough eventually came in a daring and radical interpretation of the first clause of article 1384, which speaks of liability for things a person has under his guard.<sup>198</sup> There appears to be little doubt that the framers of the Code had intended this clause to serve only as an introduction to the specific instances enumerated in the later clauses of article 1384 and in articles 1385 and 1386. The first clause was to be an explanation and justification of the principle of vicarious responsibility and the strict or semistrict liabilities for animals and buildings. French jurists in the early and middle nineteenth century never questioned this truism.<sup>199</sup> At the close of the century, however, it came to be seen that the clause might be deliberately misunderstood as projecting a much broader principle of strict liability than the few specific instances it introduced. In 1896, this theory was vigorously argued before

195. 1 SAVATIER, *TRAITÉ DE LA RESPONSABILITÉ CIVILE* 422 (2d ed. 1951) [hereinafter cited as SAVATIER]. Henceforth, all translations from the French are those of the author, unless otherwise indicated.

196. VON MEHREN 376-77, extracting *Cour d'Appel de Paris*, Aug. 20, 1877, [1878] *Sirey Recueil Général* [hereinafter cited as S.] II. 48. But see text accompanying note 203 *infra*.

197. *Lejou v. Société des Usines de la Providence*, *Cour de Cassation* (Ch. civ.), April 19, 1887, [1887] S. I. 217. For a summary of this case, see VON MEHREN 377.

198. "Control" would be a more natural translation of *garde*, but the concept has become so important and at the same time so artificial in French law that it seems better to distinguish it by an exact transliteration.

199. 1 SAVATIER 423.

the Civil Chamber of the Court of Cassation in a case involving injury to an employee by the explosion of steampipes in a boat.<sup>200</sup> It won acceptance and so initiated a principle of presumption of fault against the defendant when damage has been caused by a thing under his guard.<sup>201</sup> This principle has since become the insatiable cormorant of the French law of torts, threatening, as it does, to devour the notion of fault and to dominate utterly the field of delictual recovery. Under this presumption, the plaintiff need only show that damage was caused to him through the agency of a thing of which the defendant was the guardian. Liability ensues unless the defendant can discharge the heavy burden of showing that the damage was the result of *force majeure*, or unforeseeable accident, or the victim's own fault.<sup>202</sup>

### *The Trespasser Plaintiff in French Law*

French law has no special rules creating and treating such categories as those of invitee, licensee and trespasser. The relevance of the nature of the plaintiff's entry upon premises is taken up under general principles of unforeseeable accident and fault of the victim. Any search in the French treatises for explicit discussion of the instances and problems which figure in Anglo-American texts will only be frustrating. The most profitable method is to read extensively in the French surveys of liability under articles 1384 and 1386, and in discussions of the general defenses of unforeseeable accident and fault of the victim. Here, relevant observations occasionally can be gleaned.

Some cases of injury to visitors will, by their nature, fall under the terms of article 1386, dealing with the collapse of buildings. A leading modern French treatise defines "building," for the purposes of this article, as "every putting together of materials designed by man to raise a structure above the ground."<sup>203</sup> Another treatise comments that the concept of a building covers "movable objects incorporated in the building or which are accessory to it."<sup>204</sup> It has been held to apply to the paving of a well<sup>205</sup> and to gas pipes

200. *Guissez, Cousin et Oriolle v. Teffaine*, Cour de Cassation (Ch. civ.), June 16, 1896, [1897] *Dalloz Jurisprudence* [hereinafter cited as D.] I. 433, [1897] S. I. 17. For extracts of the case, see VON MEHREN 379-81.

201. The particular problem of injuries to employees was covered by compensation legislation in 1898. After this, the principle of presumption of fault under article 1384, introduced in the *Guissez* case, *supra* note 200, suffered something of a regression, but it came back to full triumph and final adoption in *Jand'heur v. Les Galeries Belfortaises*, Cour de Cassation (Ch. réunies), Feb. 13, 1930, [1930] D. I. 81, [1930] S. I. 121. See text accompanying note 214 *infra*; LAWSON, NEGLIGENCE IN THE CIVIL LAW 46-50 (1950).

202. See notes 234-38 *infra* and accompanying text.

203. 2 MAZEAUD 32.

204. 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 263 (10th ed. 1948) [hereinafter cited as COLIN & CAPITANT]; *Comp. des Immeubles de la Plaine Monceau v. Garnier*, Cour de Cassation (Ch. req.), March 29, 1897, [1897] *Dalloz Hebdomadaire* [hereinafter cited as D.H.] I. 216, [1898] S. I. 65; Cour d'appel de Poitiers, April 17, 1941, [1941] *Dalloz Analytique* 236.

205. LALOU, TRAITÉ PRATIQUE DE LA RESPONSABILITÉ CIVILE 710 (5th ed. 1955)

embedded in the ground,<sup>206</sup> but not to electric wires attached to a building.<sup>207</sup> The damage must result from the collapse (*ruine*) of the building, which in turn must involve a complete or partial fall of the materials which make up the building.<sup>208</sup> In one decision, the Court of Appeal of Paris went so far as to hold that article 1386 would cover a plaintiff's asphyxiation by fumes coming from a chimney which had been blocked by the fall of pieces of plaster; but this judgment has provoked critical comment from the jurists.<sup>209</sup> Thus, despite an occasional deviant decision, the scope of the article is narrowly limited and will cover only a fragment of the mass of cases involving injuries to trespassers.

When article 1386 is applicable, the plaintiff, to invoke it successfully, must demonstrate that the collapse resulted from a defect in construction or from faulty maintenance. In the majority of cases, offer of such proof by the plaintiff would amount to proof of fault on the part of the defendant and thus would alternatively establish *prima facie* liability under the general fault principle of article 1382. In an occasional case the defendant would be immune under 1382 (as when he was not the builder and could not have discovered the defect of construction even by the exercise of due diligence), and, in such cases, article 1386 does operate as a species of strict liability. Generally, however, the plaintiff is much better off under the guardianship rubric of article 1384, and it is usually the defendant who seeks to bring the case under 1386.<sup>210</sup>

Article 1386 speaks of the liability of the owner (*propriétaire*) of a building. Interpreted strictly, this term excludes the liability of a tenant. Accordingly, the owner of leased premises remains liable under 1386, though, of course, he may be able to recoup his losses from the tenant.<sup>211</sup> Whereas application of 1386 to a specific defendant forecloses suit under 1384 against the same defendant, a 1386 action probably does not prevent invoking 1384

[hereinafter cited as LALOU] citing Cour d'Appel de Nancy, May 30, 1945, [1946] D. 14. The headnote to the case reads: "By buildings in Article 1386 should be understood, not only edifices in the usual sense . . . but also any work of an immobile nature, constructed from any material, and permanently embedded in the ground, so that its collapse might cause damage."

206. LALOU 710, citing Tribunal Civil de Tours, June 3, 1930, Gazette du Palais, 8 Oct. 1930, [hereinafter cited as G.P.]

207. LALOU 710, citing Tribunal Civil de Rouen, March 21, 1949, [1949] Juris Classeur Périodique II 5003, [1949] G.P. I. 248.

208. 2 MAZEAUD 34-36 n.1044(4), citing Tribunal Civil de Nantes, May 7, 1935, [1935] G.P. II. 252; 2 MAZEAUD 36 n.1044(5 *bis*), citing Tribunal Civil de Caen, April 16, 1947, [1949] D. 5; Caisse Primaire Sécur. Soc. de Besançon v. Établ. Camelin, Cour de Cassation (Ch. civ.), Dec. 14, 1956, [1957] D. 72.

209. 2 MAZEAUD 36 n.1044(6), citing Cour d'Appel de Paris, Jan. 18, 1942, [1942] G.P. I. 178. The comment of the authors on this decision is: "N'est-ce pas aller un peu loin?"

210. 2 MAZEAUD 20.

211. *Id.* at 24-25.

against another defendant such as a tenant.<sup>212</sup> Consequently, a structure may be deemed a "building" for the purposes of an action against the owner and, simultaneously, a "thing" for the purposes of an action against the tenant or other "guardian." The plaintiff thus may be in a stronger position when suing the tenant, inasmuch as he will receive assistance from the presumption of fault which article 1384 calls into play.

#### *Duties To Trespassers Under Article 1384*

Because of the favorable presumption which article 1384 accords a plaintiff, the great majority of injuries while on the premises of another will, if litigated, occasion actions under that article. The problems involved cannot be understood without a further statement of how the article operates.

A series of attempts to curtail the concept of "thing" under 1384 have been repulsed. Although it was once held that the term did not apply to immovables, this position was rejected by a judgment of the Court of Cassation in 1928.<sup>213</sup> Again, it was argued that the principle of article 1384 must be restricted to things dangerous by their nature, but the same court decided otherwise in 1930, and today, article 1384 covers all *choses inanimées*, in other words everything—except perhaps when the injury is caused by the collapse of a building.<sup>214</sup> It is true that liability depends upon a certain degree of participation by the thing (under defendant's guard) in the causing of the damage: the liability is for *le fait de la chose*.<sup>215</sup> But it is difficult to conceive of any infliction of injury without the participation of inanimate things. If interpreted in an extreme fashion, article 1384 could, as one jurist remarked, cover every situation but the collision of two naked persons.<sup>216</sup> Clearly, some limiting principle must be adhered to, or 1384 will govern the whole field of tortious events and render otiose the basic fault notion of article 1382. The delineation of such a principle has proved troublesome, however, and remains unclear.

One early attempt to place severe limits on the operation of 1384 was made by arguing that the article could not apply when the thing in custody was, at the moment it caused damage, being actively operated by a human

212. *Soc. les Fils de Bardiner v. Soc. Ferré et Duffourg*, Cour de Cassation (Ch. civ.), Aug. 4, 1942, [1943] S. I. 89; 2 MAZEAUD 15 (4th ed. 1947), citing Tribunal Civil de Saumur, July 22, 1943, [1943] G.P. II. 192. The fifth edition of 2 MAZEAUD 21-22 takes the view that where 1386 is applicable, 1384 is totally excluded.

213. *Vidal v. du Taiguy*, Cour de Cassation (Ch. req.), March 6, 1928, [1928] D. I. 97, [1928] S. I. 225. Earlier the Cour de Cassation had refused to apply article 1384 to immovables. *Pallois v. Dalivoust*, Cour de Cassation (Ch. civ.), June 26, 1924, [1924] D. I. 159, [1925] S. I. 65; 2 MAZEAUD 190.

214. *Jand'heur v. Les Galeries Belfortaises*, Cour de Cassation (Ch. réunies), Feb. 13, 1930, [1930] D. I. 81, [1930] S. I. 121; 2 MAZEAUD 191; LAWSON, NEGLIGENCE IN THE CIVIL LAW 249-79 (1950). For the proposition that 1384 is inapplicable to cases of the collapse of a building, see 2 MAZEAUD §§ 1201, 1208 n.(11 bis).

215. 2 COLIN & CAPITANT 248.

216. Ripert, Note, [1930] D. I. 57, 59, quoted in VON MEHREN 401.

being. But, after a titanic controversy, a judgment of the full chambers of the Court of Cassation finally established that article 1384 must be applied to an accident caused by the operation of a vehicle.<sup>217</sup> Thus, 1384 came to cover negligent operation as well as the more limited category of damage caused through a defect in the thing itself, and its practical scope was enormously expanded.

It has also been argued that article 1384 is inapplicable if the "thing" played a purely passive or inert role in causing damage,<sup>218</sup> as when a bicyclist is injured when he collides with a properly parked car. In 1941, this theory was strenuously advanced against a plaintiff who, in crossing the terrace of a café, tripped over a folding chair lying flat on the floor.<sup>219</sup> But the Court of Cassation rejected defendant's argument and applied article 1384.

After these cases, it seems unsafe to say anything more than that, before article 1384 will be applied, the "thing" must have been substantially involved in causing injury. It must be a *cause génératrice* of the damage.<sup>220</sup> In determining what amounts to "generating cause" a court inevitably falls back on notions of fault. Thus, the application of article 1384 has become so extensive that it can be made workable only by injecting notions of fault and so retreating, in a circular fashion, to article 1382.<sup>221</sup>

When article 1384 is deemed pertinent, the burden it places on the defendant is not lightly thrown off. There is some dispute among French jurists as to whether 1384 preserves the notion of fault, imposing on the defendant only a presumption of fault, or whether instead it eliminates the relevance of fault theory altogether and creates a jurisprudence of risk.<sup>222</sup> Those who advocate the second viewpoint see in it *le principe du risque de propriété*, and regard liability under 1384 as strict and the article itself as creating a presumption of responsibility rather than a presumption of fault. However this may be, the defendant can only escape by showing an unforeseeable accident (*cas fortuit* or *force majeure*) or a fault of the victim which was unforeseeable and unavoidable.

The critical importance of the 1384 presumption makes it a vital matter to determine what persons may be attacked under this doctrine. The article speaks broadly of persons who have "things under their guard." Finding the

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217. *Jand'heur v. Les Galeries Belfortaises*, *supra* note 214. See excerpts in VON MEHREN 399.

218. 1 SAVATIER 452-58.

219. *Pialet v. Guise*, Cour de Cassation (Ch. civ.), Feb. 24, 1941, [1941] D. 85, [1941] S. I. 201. See excerpts in VON MEHREN 401-02.

220. 2 MAZEAUD 207; *Desbons v. Consorts Deyssieu*, Cour de Cassation (Ch. civ.), Jan. 23, 1945, [1945] D. 317, [1946] S. I. 57; *Taupin v. Arrachepied*, Cour de Cassation (Ch. civ.), March 5, 1947, [1947] D. 296.

221. 1 SAVATIER 432-35.

222. 2 COLIN & CAPITANT 278 speaks of article 1384 as establishing a presumption of fault. 1 SAVATIER 425, 427 suggests that there is more than a presumption of fault under article 1384; there is, he argues, a presumption of liability. See also 2 MAZEAUD 339-41.

guardian has thus become an elemental inquiry for the French law of torts and one that has provoked great juristic dispute. One commentator took the view that the decisions on the question of locating the guardian were so fluid that to offer strict definitions would be futile, that the concept was rather a flexible one which bent under the demands of policy.<sup>223</sup> Another commentator was prepared to hazard a general description of the guardian as the one who has ultimate control and at the same time draws the benefit from the use of the thing ("*la haute direction en même temps que le profit*").<sup>224</sup> Certainly, the owner is generally liable under 1384's guardianship principle. He may rebut the presumption of his guardianship, however, and establish that it has been transferred to another. In the typical case of the employee who drives his employer's truck, the employer will generally be the guardian. But he is entitled to show that, in the particular case, guardianship had passed to the servant, if the servant enjoyed free use and the personal control of the thing (*le libre usage et le contrôle personnel*).<sup>225</sup> It is noteworthy that if the servant is deemed to be the guardian, the master will avoid automatic vicarious liability, for the servant is then acting outside the course of his employment. If the master retains guardianship, the principle of article 1384 can be invoked against him directly, and vicarious liability need not be relied upon. The owner of an automobile is deemed to retain guardianship when another is driving with his consent,<sup>226</sup> but not when the car has been stolen.<sup>227</sup> Thus, guardianship has no necessary connection with title. On the basis of these decisions, the guardian has been defined as the person having an independent power of giving instructions with respect to the "thing" (*celui qui a, en fait, un pouvoir autonome de commandement relativement à la chose*).<sup>228</sup>

#### *Plaintiff's Status as a Defense*

In one instance of French law, which may serve as an introduction to the broader aspects of the problem, the character of the plaintiff's entry has been made specifically relevant. This is the case of the automobile guest, *transport bénévole* or *transport gratuit*. In the ordinary case of injury in an automobile accident, article 1384 operates against the defendant. But if the plain-

223. Saleilles, *La Responsabilité du Fait des Choses Devant la Cour Supérieure du Canada*, 1911 REVUE TRIMESTRIELLE DE DROIT CIVIL 23.

224. 1 SAVATIER 461.

225. 2 COLIN & CAPITANT 269.

226. Vingut v. LaGarde, Cour de Cassation (Ch. req.), June 26, 1934, [1934] G.P. II. 714. For extracts from this case, see VON MEHREN 404-05.

227. Cannot v. Docteur Franck, Cour de Cassation (Ch. réunies), Dec. 2, 1941, [1942] D. 25, [1941] S. I. 217. See excerpts in VON MEHREN 407-08.

228. 2 MAZEAUD 132-33. Professors Mazeaud and Tunc draw upon a judgment of the Cour d'Appel de Paris, July 18, 1930, [1930] G.P. II. 674, where the court said that the notion of guard is characterized by "full independence, a power to command and direct, to exercise supervision and control, so that the guardian has the ability to give orders and instructions through which he renders himself legally liable." 2 MAZEAUD 129.

tiff was a guest in the defendant's automobile, he cannot invoke 1384's presumption of fault and must prove fault under 1382.<sup>229</sup> The position of the automobile guest is, in this respect, generally regarded by French jurists as an instance of the voluntary assumption of risk. There is in this connection an interesting passage in one contemporary treatise which suggests a faint recognition in French doctrine of an invitee-licensee dichotomy akin to that of Anglo-American law.

This idea is often expressed by saying that in such cases the victim has accepted in advance the risks he has run. He will not be able to invoke the presumption of Article 1384, for he will be taken to have forfeited it, and he will not be able to obtain damages unless he can prove fault in the guardian of the thing.

This principle has been firmly laid down in many judgments dealing with automobile guests . . . ; in our view it must also apply to any case in which a person has suffered damage through the instrumentality of a thing which another has put at his disposal gratuitously and without consideration. So this would apply if for example a man should slip and hurt himself on a friend's staircase, or in any case where the accident was caused by a thing such as a football, a gun or a skate . . . used in a sport or a game in which the victim took part with others of his own free will. . . .

But the doctrine of assumption of risk does not apply and the victim may rely on Article 1384 when the thing has not been put at his disposal by a purely altruistic act on the part of the guardian. This would be the case where the victim has made use of the thing not in his own interests but in those of the guardian, to render him some service, even though he may not get paid for it . . . or where the driver has offered a lift in his car with some business motive (out of a wish to close a deal or to sell the car).<sup>230</sup>

229. *Gasse v. Saby*, Cour de Cassation (Ch. civ.), March 27, 1928, [1928] D. I. 145, [1928] S. I. 353, COLIN & CAPITANT 330 (Supplement). The automobile guest may, however, invoke article 1384 against the driver of another car colliding with the car in which the plaintiff is riding. 1 SAVATIER 164 n.(7), citing Tribunal Civil de Seine, Dec. 11, 1934, [1935] D. 45; Tribunal Civil de Corbeil, Jan. 12, 1938, [1938] G.P. I. 578. Children who are automobile guests are not taken to have accepted the risk and may invoke article 1384. 2 COLIN & CAPITANT 276 n.2. Where the automobile guest is unable to rely on article 1384 and must prove fault under article 1382, it was once thought that he must prove more than ordinary fault, that he must prove *faute lourde*. But this was rejected in *Gasse v. Saby*, Cour de Cassation (Ch. civ.), March 27, 1928, [1928] D. I. 145, [1928] S. I. 353, 2 MAZEAUD 290. So in one case the plaintiff automobile guest recovered against the driver who had driven his decrepit car over a very bumpy road so that the steering gear broke. The court held that this was not a *cas fortuit* exonerating the defendant from fault. *Leroy v. Suchet*, Cour de Cassation (Ch. req.), March 8, 1937, [1937] D.H. 314, 1 MAZEAUD 561.

230. 2 COLIN & CAPITANT 276. In this context, it seems that the French courts have not escaped the difficulties, well known to English and American tribunals, of discriminating between the invitee and the licensee. So a doctor taking the relative of a patient to a consultation in his car has been submitted to the presumption of fault under article 1384. 1 SAVATIER 162, citing Cour de Cassation (Ch. req.), March 1, 1933, [1933] G.P. IV. 865.



In this passage, no explicit reference is made to the victim who has unlawfully used the defendant's "thing" or unlawfully entered on the defendant's premises. One or two cases of the adult trespasser in vehicles can, however, be found in the texts. In 1929, the Criminal Division of the Court of Cassation held that one who had hidden in the defendant's car without the defendant's knowledge could not invoke article 1384.<sup>231</sup> According to one commentator, the victim's unlawful conduct in this case would also seem to preclude the defendant's liability under the general fault doctrine of article 1382.<sup>232</sup> In the same year, on the other hand, another court held that a train passenger who rode in a second class compartment while holding a third class ticket could successfully invoke article 1382 for an injury to his thumb while closing the door.<sup>233</sup> It would be rash indeed to assume that the nature of the plaintiff's presence as a trespasser will automatically rule out the application of articles 1384 and 1386. The impingement of the trespass on these articles can only be understood by considering the general nature of the plaintiff's fault as a defense.

French courts commonly say that the defendant cannot displace the burden placed on him under article 1384 and escape liability by demonstrating that he was not personally at fault. He must prove affirmatively that the accident was due to an unforeseeable or foreign cause, of which the most common example is the fault of the victim.<sup>234</sup> What the defendant really must show is that the accident was in no way the fault of the thing of which he had guard.<sup>235</sup> The fault of the victim plaintiff will not exonerate the defendant completely unless it was the sole cause of damage which itself was unforeseeable and inevitable. If the victim's negligence falls short of this measure but was, nevertheless, a contributory cause of the damage, the French courts apply the doctrine of apportionment and the damages will be reduced.<sup>236</sup> It

231. *Arthur v. Ollivier*, Cour de Cassation (Ch. crim.), July 18, 1929, [1932] S. I. 159, [1929] G.P. II. 618. 1 SAVATIER 165-66.

232. 1 SAVATIER 166.

233. 2 MAZEAUD 374 n.1460(1), citing Tribunal Civil de Saumur, Feb. 28, 1929, [1929] G.P. II. 28; see Cour d'Appel de Besançon, June 14, 1944, [1945] S. II. 21.

234. *Chem. de fer de l'Ouest v. Marcault*, Cour de Cassation (Ch. civ.), Jan. 21, 1919, [1922] D. I. 25, [1922] S. I. 265; 1 SAVATIER 487-88; 2 COLIN & CAPITANT 228, 267-68; LALOU 255-56.

235. Savatier puts the matter in this way: "Under Article 1382 *cas fortuit* is established by any kind of proof which excludes fault. But to rebut under Article 1384 it is not enough to show the absence of fault; it must be shown further that the damage did not spring from the activity of the thing as well as from that of the guardian." 1 SAVATIER 487.

236. *Jehan v. Chem. de fer Départementaux de la Mayenne*, Cour de Cassation (Ch. civ.), Feb. 9, 1937, [1937] S. I. 127; 2 COLIN & CAPITANT 228. Savatier argues that the victim who was at fault should always be denied under article 1384 and referred to article 1382. He stresses the difficulties of applying the doctrine of apportionment under article 1384, when the defendant's fault cannot be measured, as it exists only by virtue of a presumption. The real fault of the plaintiff must be measured against the presumptive fault of the defendant. 1 SAVATIER 498. However, the courts have not hesitated to make apportionments in such cases. *Soc. Durand-Frere et Seurat et Comp. d'assur. La*

has been suggested that, at present, the courts are tending to admit the fault of the victim as a defense more readily.<sup>237</sup> They are relaxing somewhat the requirements of unforeseeability and now demand only that the victim's conduct be *normalement imprévisible*.<sup>238</sup>

The evolution of these doctrines can be seen in the decisions on injury done to trespassing children. The French courts are not so willing to lower the standard of care demanded from children for their own preservation as are English and American courts,<sup>239</sup> but the actual decisions in these cases do not differ markedly from the probable outcome in common-law jurisdictions. For example, an electric authority has been held responsible to a nine-year-old child who climbed a pylon and received a damaging shock, even though the authority had complied with the statutory minimum requirements for preventive measures. The fault of the child was held to be no defense, since the authority could have done even more by way of precaution.<sup>240</sup> But a defendant who, on a Sunday, left a threshing machine under a tarpaulin at a spot off the highway, a location where such machines were customarily kept, was not liable to a child injured while playing with it. In this case, the fault of the child was held to be a complete defense.<sup>241</sup> A child who broke into a locked storeroom and stole an explosive cartridge could not recover, even though the defendant had failed to observe some of the statutory requirements for storing explosives.<sup>242</sup> The liability of the defendant was reduced by half in a case in which a child climbed an electric transformer;<sup>243</sup> by four fifths in a case where a child climbed scaffolding.<sup>244</sup> The defendants were held not to be liable at all to a child who was injured after having pierced the roof of an electric transformer and pushed a wire through,<sup>245</sup> nor to a child who had

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*Préservatrice v. Vve. Hainglaise*, Cour de Cassation (Ch. req.), April 13, 1934, [1934] D. I. 41, [1934] S. I. 313; 1 SAVATIER 495-97. The Court of Cassation takes the view that the victim's fault is only a ground for reducing damages unless the defendant can show that it was *l'unique faute*. *Antokolsky v. Nessi*, Cour de Cassation (Ch. req.), Jan. 31, 1938, [1938] S. I. 229; 1 SAVATIER 495-97.

237. "As far as one can make out trends in the case law in recent years, it seems that we are witnessing a slight reversion to the principle of fault and a stabilization of the law of civil responsibility." 1 MAZEAUD 95; see 2 *id.* at 519-23.

238. Cour de Cassation (Ch. civ.), Jan. 25, 1956, [1956] *Juris Classeur Périodique* 2.9153; 2 MAZEAUD 520.

239. 1 MAZEAUD 529-31.

240. *Soc. des Forces Motrices de la Loue v. Jallon*, Cour de Cassation (Ch. req.), Dec. 23, 1929, [1930] D.H. 102, [1930] G.P. I. 341; 1 SAVATIER 237.

241. 1 SAVATIER 237, citing Cour d'Appel de Montpellier, Oct. 22, 1937, [1938] D.H. 44.

242. 1 SAVATIER 237, citing Cour d'Appel de Chambéry, Nov. 18, 1937, [1938] D.H. 72.

243. 2 MAZEAUD 379 n.1468(4) (4th ed. 1947), citing Cour d'Appel de Douai, Oct. 30, 1930, [1930] *Recueil Douai* 326.

244. 2 MAZEAUD 379 n.1468(4) (4th ed. 1947), citing Cour d'Appel de Colmar, April 22, 1932, [1932] G.P. II. 51.

245. 2 MAZEAUD 379 n.1468(4) (4th ed. 1947), citing Cour d'Appel d'Amiens, May 12, 1937, [1937] G.P. II. 441.

started up a turntable.<sup>246</sup> A seventeen-year-old boy who was injured after putting his hand through the grille of an elevator door was permitted to recover only partial damages.<sup>247</sup> The French decisions are thus not noticeably more solicitous of the trespassing child than those in many Anglo-American jurisdictions. Indeed, they might appear somewhat harsher.

If an action is brought under article 1386 (dealing with the collapse of buildings), the probabilities of recovery seem much the same as under 1384. One treatise describes the effect of 1386 as "a presumption of fault, which can only be rebutted by showing the fault of the victim (as, for example, when the victim has entered another's property) or *force majeure*";<sup>248</sup> and another cites the illegal presence of the victim as a defense under 1386.<sup>249</sup> Apparently, however, the illegal presence of the victim will completely exonerate the defendant under article 1386 only if it is taken to be the sole cause of the damage. Otherwise fault will be apportioned and damages reduced.<sup>250</sup>

### Summary

An action for damages brought by one who has suffered injury while on the premises of another will, in French law, most naturally fall under the scope of article 1384 or 1386, and will thus involve a presumption of fault against the defendant. If the plaintiff was illegally present on the premises, he may be held, in some cases, to have barred himself thereby from invoking

246. 2 MAZEAUD 379 n.1468(4) (4th ed. 1947), citing Cour d'Appel de Nogent-le-Rotrou, July 20, 1937, G.P. II. 2706.

247. 2 MAZEAUD 379 n.1468(4) (4th ed. 1947), citing Cour d'appel de Seine, Oct. 23, 1942, [1942] G.P. II. 2266.

A few cases, decided under article 1385, of injuries caused to trespassing plaintiffs by defendant's animals are also interesting here. In *Desplats v. Garabet*, Cour de Cassation (Ch. civ.), Feb. 16, 1956, [1956] D. 445, [1956] S. 6, the deceased was a member of a hunting party which, in returning home, crossed the defendant's field. The deceased was attacked and killed by the defendant's steer. The Court of Cassation reversed a judgment of the court below which had found the defendant not liable. The Court of Cassation took notice of the fact that the defendant tolerated people crossing his field and held that the deceased's fault was *légère* and could not exonerate the defendant completely. This decision may be contrasted with *Muhr v. Defaye*, Cour de Cassation (Ch. civ.), March 15, 1956, [1956] D. 445, [1956] S. 6, and *Genoud v. Perret*, Cour d'Appel de Chambéry, Dec. 1, 1953, [1954] D. 175. In the first of these cases the Court of Cassation confirmed the lower court's denial of recovery to a plaintiff who had gone uninvited into the defendant's field and had been kicked by defendant's wild colt while attempting to pet the animal (see *Marlor v. Ball*, [1900] 16 T.L.R. 239 (C.A.)); in the other decision recovery was denied the plaintiff who had gone into the defendant's enclosed field and been gored by a steer.

248. 2 COLIN & CAPITANT 263.

249. 2 MAZEAUD 506.

250. *Ville de Coutances v. Dandeville*, Cour de Cassation (Ch. civ.), June 21, 1930, [1936] S. II. 156 (note), [1930] G.P. II. 337; 1 SAVATIER 531 n.(3). Some writers take the view that the illegal presence of the victim leads to a total exoneration of the defendant under article 1386. 2 MAZEAUD 506 n.1519(2).

article 1384. Proof of fault must then proceed under article 1382. If, on the other hand, the trespasser is not taken to have accepted the risk—often the rule with child trespassers—the plaintiff may utilize article 1384. Here, to escape liability, the defendant must show that the plaintiff's fault was the sole cause of the accident in the sense that his conduct was unforeseeable and unavoidable. Failing this, the defendant may have the damages reduced by showing that the plaintiff's fault was a contributing cause of the accident. In any case, the totality of facts bears upon the final determination.<sup>251</sup>

#### EVALUATION AND CONCLUSION

The French experience is a demonstration of the practicality of a general theory of liability in this field, and at the same time shows that such a general theory need not lead to incessant verdicts in favor of the plaintiff. French law has shifted from its nineteenth century insistence on proof of fault to an acceptance of semistrict liability, demanding from the defendant, before he can be exonerated, proof that the accident was caused by the plaintiff's own fault

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251. The clash between the French and common-law approaches in the Canadian province of Quebec is interesting. In Quebec the prevailing legal system is historically derived from the *coutume de Paris* and is now consolidated in a Civil Code, dating from 1866. The portions of the Code dealing with responsibility are almost identical with those of the French Civil Code. See THOMSON, *LAW OF NEGLIGENCE AND DELICTS IN CANADA* 9-14, *passim* (1946). In the area of liability of occupiers to those who come on their land, however, the courts of Quebec have often declared that the application of the Civil Code is identical with that of the rules of common law. See, *e.g.*, *Caza v. Clercs paroissiaux ou catéchistes de St. Viateur*, 41 *REVUE DE JURISPRUDENCE* 70, 84 (Qué. 1935), where the court said: "Our courts . . . have always applied the doctrines of the common law of England to questions of the duties of owners and occupiers towards persons coming on to their premises." (Translated from the French.) Other cases cited in the opinion to support this proposition were *Cité de Verdun v. Yeoman*, 1925 *Rapports Cour Suprême* 177; *Brochu v. The King*, 15 *Can. Exch.* 501 (1914) [incorrectly cited: correct citation is 15 *Can. Exch.* 50]; *Montreal Tramways Co. v. Simpchechen*, 24 *Qué. B.R.* 81 (1915); *Montreal Light, Heat & Power Co. v. Lowrie*, 25 *Qué. B.R.* 367 (1916); *Ladurantaye v. Grand Trunk Ry.*, 55 *Qué. C.S.* 48 (1918); *Quebec Ry. Light Heat & Power Co. v. Rousseau*, 39 *Qué. B.R.* 65 (1924); *Grand Trunk Ry. v. Barnett*, [1911] *A.C.* 361 (P.C.) (Ont.). This tendency to assimilation has drawn a sharp comment from a former judge of the Supreme Court of Canada:

This term [trespasser] can only be translated into French by making use of a circumlocution, such as—one who goes on to the property of another without permission. . . . In our law when there is a question of tortious liability, the only enquiry is whether there was any harm resulting from fault and in this respect the law makes no distinctions. Thus we have no need of the arbitrary categories used in English law. Even the trespasser will have his action if he has been injured by conduct on the part of the occupier which amounts to fault.

Mignault, *Chronique de Jurisprudence: Conservons notre droit civil*, 15 *REVUE DU DROIT* 28, 30, 33 (1936). (Translated from the French.) See also *Montreal Light, Heat & Power Co. v. Lowrie*, 25 *Qué. B.R.* 367 (1916), where the French speaking majority of the Quebec Court of King's Bench found for the plaintiff despite a dissent by the English speaking judge who drew on English precedents.

or by an unforeseeable and unavoidable extraneous intervention. The nature of the plaintiff's entry on the premises is accordingly taken up under the broad consideration of the decisiveness of his fault in bringing on his injury. That he would constitute a trespasser under common-law doctrines is to the French courts by no means a conclusive circumstance against him. This area of law is, indeed, one of the sharpest illustrations of the mythical nature of the belief cherished by common lawyers that a codified system leads to preordained and mechanical decisions. While the French have achieved a fluid but rational approach which allows a policy-oriented implementation of the notion of fault, it is the common-law jurisdictions that have been beset by the hardened arteries of a rigid categorization.

If, in this area of the law, there is a development shared by all the common-law jurisdictions examined, it is the tendency to proliferate subsidiary concepts and adventitious doctrines around the simple precepts of the nineteenth-century cases. Those early cases introduced distinctions between trespassers, licensees and invitees. Subsequently, the notion of trespasser itself was refined by the qualifications of seen and unseen trespassers, the "technical" trespasser, the trespasser who may become a licensee by the inactivity of the occupier, and the conditional child licensee who reverts to the status of trespasser when unaccompanied by an adult.<sup>252</sup> The privileges of the oc-

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252. The notion that a child of tender years may be a trespasser if unaccompanied by an adult has received some currency in England and was reiterated by the Court of Appeal in *Bates v. Stone Parish Council*, [1954] 1 Weekly L.R. 1249 (C.A.). The proposition there was that a license to children to come into a public playground may be construed not to include a young child unaccompanied by a suitable guardian. See Williams, *Note*, 18 MODERN L. REV. 59 (1955). In *Phipps v. Rochester Corp.*, [1955] 1 Q.B. 450, 469-70 (1954), Mr. Justice Devlin rejected this approach as being too difficult in application. He felt that it would be enormously troublesome to decide what are tender years, who is a suitable guardian, and what principle to apply if the attention of the guardian should be distracted (as indeed happened in *O'Connor v. British Transp. Comm'n*, [1958] 1 Weekly L.R. 346 (C.A.)), where a child of three, travelling with her mother, opened a door and fell out of a train while the mother was seeking a light for her cigarette). Mr. Justice Devlin's attention was not drawn to the judgment of the Court of Appeal in the *Bates* case. But though rejecting the conditional licensee approach, Mr. Justice Devlin emphasized that the licensor's duty is not unlimited and that parents must accept a large measure of responsibility for the safety of their children. See Williams, *Note*, 18 MODERN L. REV. 393 (1955). For a recent affirmation in the United States of the duty of parents, see *Jones v. City of Aberdeen*, 138 F. Supp. 727 (D. Md. 1956) where a 23-month-old child strayed from his house, across a field, and on to railroad tracks where he was injured by a train; stressing the duty of parents, the court denied liability. It would certainly be quite wrong to minimize the duty which a parent owes to his child, but there must be a realistic appraisal of the limits within which this duty can humanly be discharged. And where the parent has neglected to do what he could, we are still left with the disturbing contemplation of a child visited with an uncompensated injury for the sins of his parents. This contemplation has not always disturbed commentators.

The fact is, that the vast majority of children have protectors appointed alike by nature and by law, viz., their parents, who have legal power to control their

cupier defendant have, in some jurisdictions, been denied to those who are not themselves occupiers, though at this point the jurisdictions diverge and the doctrine is subjected to considerable internal refinement. Furthermore, reckless or wanton or willful conduct has been differentiated from simple negligence. Attractive nuisances and traps are often vital considerations. Or, everything may turn on the distinction between an activity and a condition. Conditions themselves are subdivided into natural and artificial ones, and artificial conditions bifurcate further into those dangerous and highly dangerous.

These complications were inevitable, for the simplicity of the nineteenth-century approach was a simplicity of harshness, reflecting a social bias which could not long be tolerated. Admittedly, the accretion of the subsidiary doctrines sometimes leads to the expression of factual differences which may be relevant to the decisional process. But whether their elevation to categories of decisive significance is an aid or an impediment to justice is another question.

This inquiry must begin with an examination of the reasons which could underlie limiting the right to recovery of trespassers as a class. Justification might be found in the element of wrongdoing that accompanies the commission of a trespass, on the theory that the trespasser ought not to recover for injury caused through his voluntary self-involvement in illegal conduct. But in all jurisdictions the inherence of some element of illegality in the plaintiff's conduct, taken alone, has been rejected as an insufficient ground for denying him a remedy.<sup>253</sup> Surely this is proper, for only an extreme theory of retribution could transform any taint of illegality into a bar against damages for injury. In any event, the trespasser usually is not in breach of penal law and generally commits a tort only in the barest sense—one that would entitle the occupier to nominal damages. Under any fault doctrine, he may be altogether guiltless in that the trespass resulted from an innocent mistake.

But, it may be said, in the case of the trespasser the causal connection between the plaintiff's illegal conduct and the damage is apparent and strong. The illegality consists of his very presence in the place where he is injured.

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actions, and whose moral duty to keep their children from entering upon dangerous premises is generally regarded as at least equal to the moral obligation of the landowner to fence them out. . . . If those who brought the child into the world are unable, by reason of poverty, to provide him a playground, this may afford an argument for the passage of a statute imposing that duty upon the municipality, in which case each landowner would have to contribute his proportion of the expense. But this is quite another thing from assessing upon a single unfortunate landowner the entire damage arising from the want of such a playground.

Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349, 371-72 (1898). This was perhaps a reasonably enlightened view for a time before the development of liability insurance. The fact is that the dilemma cannot be satisfactorily resolved while we look for fault in the defendant. It is fundamentally a problem of insurance.

253. See PROSSER, TORTS 162 (2d ed. 1955).

Unlike an instance of coincidental illegality which no more than synchronizes with the infliction of injury, for example, damage to an unregistered automobile, the trespasser's unlawful act is a *sine qua non* of the infliction of harm.

The answer to this argument is that all jurisdictions recognize liability in the defendant who acts recklessly toward a trespasser of whose presence he is aware. The trespass of that known plaintiff remains equally a *sine qua non* of the injury, but some acts simply are not permitted the defendant under these circumstances. Thus, illegality is not always a defense and, by itself, therefore, is not an adequate explanation of the trespasser plaintiff's inferior position.

The argument of illegality can be stated in a more sophisticated and palatable form by speaking in terms of voluntary assumption of risk or contributory negligence. In the sense of cheerfully accepting the prospect of injury, the trespasser, of course, does not assume the risk. Usually, he will no more expect to be injured than will the invitee or licensee. The matter is obscured by the lack of any clear demarcation between the defenses of voluntary assumption of risk and contributory negligence. In an analysis by Glanville Williams, assumption of risk is a doctrine which, for the sake of clarity, should be confined to cases in which the plaintiff has accepted the "legal risk"—that is, cases involving some evidence of an agreement between plaintiff and defendant whereby the former waives his rights of action with respect to a known source of danger.<sup>254</sup> As Williams points out, given such an analysis the defense of voluntary assumption of risk can scarcely be applicable in a negligence action (except where the negligence is incidental to a contractual relationship), since plaintiffs do not, as a rule, bargain to waive rights of action for defendants' future carelessness. Certainly, assumption of risk could hardly be applied to a trespasser plaintiff,<sup>255</sup> though it is quite possible to conceive of its application to the licensee or invitee who enters with warning of a defect in the condition of the premises.

Williams suggests that his analysis of the meaning of assumption of risk is supported by English case-law developments. The situation seems somewhat different in the United States. Writing of the relationship between the two defenses, Prosser says: "[T]he courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct. . . ."<sup>256</sup>

Williams' analysis sets up a much sharper and seemingly more rational distinction. In England, the present need for such a clear division between

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254. GLANVILLE WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE: A STUDY OF CONCURRENT FAULT* §§ 72-75 (1951).

255. Though it was so applied in *Ilott v. Wilkes*, 3 B. & Ald. 304, 106 Eng. Rep. 674 (K.B. 1820), where the trespasser had been injured by a spring-gun he knew to be present. See WILLIAMS, *op. cit. supra* note 254, § 73, at 297.

256. PROSSER, *TORTS* 305 (2d ed. 1955). See also 2 HARPER & JAMES § 22.2, at 1201 (1956).

the two defenses is pressing, since, under the Law Reform (Contributory Negligence) Act of 1945,<sup>257</sup> damages may be apportioned in a case of contributory negligence, while assumption of risk is a total defense. In most United States jurisdictions, this pressure for distinction does not exist, and it is only important to be aware of the overall scope of the two defenses. Nevertheless, to view the trespassing status of the plaintiff as raising the issue of contributory negligence rather than that of assumption of risk is not only more elegant, but more realistic as well.

That the trespassing status of the plaintiff does inevitably raise the issue of contributory negligence is not disputed, but what must be vehemently asserted is that affixing the label "trespasser" is a hopelessly inadequate method of solving the contributory negligence issue which is raised. The category of trespasser includes many diverse personalities. A random selection of trespassers might be: a burglar; a canvasser who ignores a "No Canvassers" notice;<sup>258</sup> a man who deliberately takes a short cut over his neighbor's field; a man who mistakenly walks on another's land believing it to be his own;<sup>259</sup> a man who is wrongly directed into premises which he has no permission to enter; a man who in good faith accepts an unauthorized invitation to go into another's premises; a policeman who walks through the open door of a warehouse at night to satisfy himself that all is well;<sup>260</sup> a girl whose father takes her out for a ride in his employer's truck.<sup>261</sup> To classify all these persons under one doctrinal rubric for the purposes of contributory negligence makes no sense.

Courts have not, of course, been unaware that the behavioral classification may not be a functional one. The growth of doctrines of "technical" trespass and licensee by acquiescence represents attempts to escape the rigidity of the trespasser label. But they no more than dent the surface of the concept, which

257. 8 & 9 Geo. 6, c. 28 (1945).

258. In *Christian v. Johannesson*, [1956] N.Z.L.R. 664, the plaintiff, who had entered a yard to solicit an order, was bitten by a dog. He had not seen a sign which read "Private Property: Keep Out." It was held that the sign was not so placed that it could reasonably be expected to be seen and the plaintiff was accordingly not a trespasser.

259. Whether those who mistakenly go on to another's property are to be regarded as trespassers is not a well settled topic. Cf. FLEMING, *TORTS* 42-43, 462-63 (1957); 1 HARPER & JAMES 10-16 (1956); RESTATEMENT, *TORTS* § 165 (1934) (suggesting that, where the invasion is unintentional, there should be no liability in the absence of actual damage); WINFIELD, *TORT* 362-93 (6th ed. Lewis 1954); Green, *Landowner v. Intruder; Intruder v. Landowner: Basis of Responsibility in Tort*, 21 MICH. L. REV. 495, 496 (1923).

260. *Great Cent. Ry. v. Bates*, [1921] 3 K.B. 578 (C.A.). See also *Davis v. Lisle*, [1936] 2 K.B. 434 (police officer who enters private premises to make inquiry about an obstruction in the street becomes a trespasser if he refuses to leave when requested to do so). Compare *Racine v. Morris*, 136 App. Div. 467, 121 N.Y. Supp. 146 (1910), *aff'd*, 201 N.Y. 240, 94 N.E. 864 (1911) (police officer on patrol found door ajar and entered the building; stepped down an unguarded elevator shaft; held a licensee).

261. *Bettes v. Canadian Nat'l Rys.*, 64 Ont. L.R. 211, [1929] 4 D.L.R. 175 (App. Div.).



for the most part still dominates the field. What is needed here is an ability to consider the precise circumstances in which each individual plaintiff found himself on the defendant's premises, for the character of the entry is certainly a relevant consideration. The point of this criticism is, indeed, not that we should ignore the trespassing status of the plaintiff but rather that the concept of trespass is a hopelessly unsubtle one which precludes any real consideration of the precise circumstances of his entry. At present, in a case where the plaintiff is a "real" trespasser so that the court does not wish to allow recovery, it will rest easy on a simple application of the wanton-and-willful rule. If the plaintiff is a trespasser in some lesser sense, the court, wishing to grant recovery, will either seek to deny his trespasser status or, should this prove impossible, seek some subsidiary reason for refusing to apply the wanton-and-willful rule. The result is unpredictability in administration and hopeless confusion. Only the introduction of general negligence theory can alleviate this state of affairs. Far from creating vagueness and uncertainty, a general theory would introduce a rational, easily comprehensible and uniform approach.

Analyzed from the defendant's viewpoint, the conventional argument is found to rest on the free use of land. The occupier's interest in free use, it is assumed, necessitates restricting the trespasser's right of recovery.<sup>262</sup> But this assumption ignores the fact that two separate considerations are involved here as, indeed, in all tortious remedies. In the first place, the voice of the immediate victim cries out for his peculiar compensation. Second, the imposition of liability has a general, educative impact. Apprehension of liability breeds a socially therapeutic caution which, though difficult to measure, is surely present. Public policy should be concerned not only with whether the individual trespasser deserves to recover as an ethical problem, but also with imposing an awareness of possible liability on potential tortfeasors in order to curtail the maiming of individuals. Naturally, a part must be played both by the future plaintiff's sense of self-preservation and, especially, by the supervision and education of children,<sup>263</sup> but the threat of liability posed at the occupier can add a not inconsiderable supplement. Furthermore, it can scarcely be thought today that society's interest in the occupier's unrestricted use

262. See Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 349, 361-62 (1898):

The beneficial use of land is a primal necessity; not only to those individual landowners who happen to be defendants in lawsuits, but to the entire human race. . . . To say, for instance, that B must keep his land in safe condition to be trespassed upon, would often result in practically depriving B of certain modes of beneficial enjoyment unless he takes precautions which are incompatible with profitable user, and might in effect amount to a confiscation of his land for the benefit of trespassers.

263. For a discussion of children's attitudes to trespass and the extent to which these attitudes may be modified by environment and education, see Latham, *Children's Concepts Concerning Trespass*, 1928 (unpublished thesis in State University of Iowa Library).

of his premises outweighs its interest in the life and limb of its members—especially of its children.

The other traditional argument for restricting the occupier's liability rests on the great principle of fault as a cornerstone of liability. Chipped and eroded as this cornerstone may be, it still underlies and supports a great area of tort dialectics. Indeed, it may be suggested that, more than the interest in land use, it was the seeming absence of fault in the occupier which underlay the nineteenth-century limitations on the trespasser's rights of recovery.<sup>264</sup> The rule as to liability for willful and wanton misconduct toward a known trespasser may be taken as a nineteenth-century exception in those instances where fault might be found in the occupier's conduct. This rule has come under increasing strain with the simultaneous advent of the broadening interpretation of fault and the increasing unimportance of the fault principle. Where the occupier has reason to anticipate the presence of trespassers and at the same time maintains without adequate safeguards a dangerous activity or dangerous structures or artificial conditions on his land, it becomes possible to call his fault decisive. Where the occupier is involved in highly dangerous activities such as erecting or maintaining high-voltage electrical apparatus, the position of the trespasser plaintiff has also been ameliorated by the impingement of the general doctrines of strict liability. Nobody has advocated strict liability toward trespassers, but the readiness to employ theories of strict liability to assist plaintiffs other than trespassers must have encouraged the discovery of fault in the occupier toward a trespasser plaintiff in similar situations.

The deeper question here is the extent to which the trespasser's recovery must still be moored to the presence of fault in the defendant, and this, of course, is a problem which underlies the whole development of the law of torts. It is a commonplace that this development is proceeding gradually in the direction of a system of social insurance. The common law is supplemented by statutory schemes of compensation which, in different jurisdictions to a greater or lesser extent, have the air of national insurance. In matters which preserve the formal structure of an adversary system, notions of liability have been significantly molded by the incidence of private liability insurance. The test of liability, it has been suggested, may become the availability of insurance to the defendant.<sup>265</sup>

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264. See Smith, *supra* note 262, at 368: "The plaintiff's action is defeated not because his own wrong bars a recovery against the landowner who has neglected to perform a duty owing to him, but because he has not succeeded in establishing the primary proposition that the landowner owed to him the duty in question." Smith used this as an argument for putting child plaintiffs in the same position as adults.

265. Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445 (1950). See also Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949); Greene, *Must We Discard Our Law of Negligence in Personal Injury Cases?*, 19 OHIO ST. L.J. 290 (1958); James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537 (1952);

The area of liability to trespassers, with its frequent cases involving maimed children, is one where insurance principles ought to dominate. Society's loss through the destruction of its young potential is great. If injury to children cannot be avoided, society still has the most pressing interest in providing means for the rehabilitation of the victims so that they may yet be useful to the limit of their remaining capacities. Apart from these utilitarian considerations, the stricken child is one of life's most afflicting spectacles. The inability to obliterate entirely the agony of accidents to children makes the faint assuagement that money can provide all the more necessary. This should come from a national system of insurance, but, so long as such a solution continues to be utopian, the courts must work as best they can with the materials of the law of torts. The burden of making the occupier pay for the inevitable horrors of life is mitigated by the already widespread incidence of insurance. Industrial premises are almost invariably insured against liability to those who are injured on the premises, either through external assurers or a form of self-insurance. A great number of private householders also carry such insurance. Many do not, of course, and vast areas of rural land are not so protected. But insurance is always available, and the premiums are not heavy. An increase in the number of verdicts favoring trespassing plaintiffs would necessitate only a very slight inflation of insurance premiums.<sup>266</sup> This cost cannot be viewed as a serious infringement on the beneficial use of land, and, if any special burdens are revealed, they should be accommodated by legislation affording tax relief to the occupier. Thus, the entire community might pay part of the financial burden as it reflects the inevitability of accidents on land. The availability of private insurance has made the beneficial use of land a weak excuse for the occupier's immunities which, in turn, have disguised the reality of the social harm done by injuries to trespassers, and obscured the means available for its rectification.

An award of damages by a jury is admittedly not the perfect instrument for adjusting a social imbalance. Jury awards are influenced by the capricious operation of sentiment, and they exhibit distressing fluctuations from jurisdiction to jurisdiction. The variations are particularly evident in cases of the death of children, where the considerations ought to be very different from

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James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431 (1950).

266. This was the opinion, given to the author in conversation, of an insurance executive of experience in this field. 2 HARPER & JAMES § 27.3, at 1438, speaks of the risk as "readily and reasonably insurable." In the case of *Bates v. Stone Parish Council*, [1954] 1 Weekly L.R. 1249 (C.A.), see note 252 *supra*, the plaintiff child was injured in a playground operated by the defendant Council. In the trial court damages of £17,500 were awarded, which the Court of Appeal reduced to £9,000. The Council carried only £5,000 insurance and the rest of the sum would have to be borrowed. Since the community consisted of only 8,000 inhabitants, this might appear burdensome. See Williams, *Note*, 18 MODERN L. REV. 59 (1955). The moral is perhaps not that damages should be smaller but that insurance coverage should be higher.

cases of injury to a plaintiff who is still living. The time is overdue for extensive research into the theory and quantum of compensatory damages, but such an investigation is quite outside the scope of the present discussion. We must for the moment assume the employment of existing institutions.<sup>267</sup>

267. On damages in the United States generally, see 2 HARPER & JAMES §§ 25.3-25.23, at 1316-60, and, with particular reference to wrongful death, 3 FRUMER & BENOIT, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES §§ 3.01-3.19, at 300-21 (1957); McCORMICK & FRITZ, CASES AND MATERIALS ON DAMAGES 371-74 (1952); OLECK, DAMAGES TO PERSONS AND PROPERTY: STATE AND FEDERAL §§ 195-98B (1957). For the wrongful death of children, the calculation of damages with respect to the estate is generally performed on the same basis as with adults. With respect to an action by the survivors the measure of damages is generally the prospective services that the child might render, plus the prospective contributions he might make from his earnings, minus the cost of his upbringing. Some jurisdictions further allow damages for anguish or bereavement, 3 FRUMER & BENOIT, *op. cit. supra* § 3.09, at 310 n.6. Actual awards are so variable that only an extended study could offer much guidance. The following are random examples: Northern Pac. R.R. v. Everett, 232 F.2d 488 (9th Cir. 1956) (death of girl of sixteen; surviving father whom she had helped with farm work given \$8,000); McEntyre v. Jones, 128 Colo. 461, 263 P.2d 313 (1953) (surviving mother of girl of thirteen awarded \$7,500); Svient v. Pennsylvania R.R., 8 Ill. App. 2d 360, 132 N.E.2d 83 (1956) (boy of six awarded \$55,000 for severe burns); Kentucky & Ind. Terminal R.R. v. Mann, 312 S.W.2d 451 (Ky. 1958) (two-and-a-half-year-old boy awarded \$175,000 for loss of right arm and right leg; on review new trial ordered on the question of damages; court said better practice was to require itemized verdict); Courtney v. Apple, 345 Mich. 223, 76 N.W.2d 80 (1956) (death of boy of two; award of \$700 funeral expenses confirmed), criticized in 18 NACCA L.J. 374-80 (1956), citing cases of large awards for the death of children; Wytupeck v. City of Camden, 25 N.J. 450, 136 A.2d 887 (1957) (nine-year-old boy received injuries which necessitated amputation of leg and caused 90% disability of left hand: award of \$150,000 to boy and \$20,000 to parents held not excessive).

In England, in the event of a tortious death, claims may be made under the survival statute for the benefit of the estate, Law Reform (Miscellaneous Provisions) Act, 24 & 25 Geo. 5, c. 41 (1934), and under the wrongful death statute for the benefit of dependents, Fatal Accidents Act, 9 & 10 Vict., c. 93 (1846). English courts have come to recognize that in a claim for personal injuries an element of damages to be considered is "loss of expectation of life." Flint v. Lovell, [1935] 1 K.B. 354 (C.A. 1934). In Rose v. Ford, [1937] A.C. 826, the House of Lords held that such a claim survived for the benefit of the estate under the Law Reform Act of 1934. In Benham v. Gambling, [1941] A.C. 157 (1940), the House of Lords said that, in considering loss of expectation of life as an element of damages, "the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life." *Id.* at 166 (Viscount Simon, L.C.). Proceeding on this basis, the House took the view that in the case of the death of a young child damages under this head should be small. "The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made." *Id.* at 167. In Benham v. Gambling itself the House of Lords reduced the trial judge's award of £1200 to £200, and in later cases of the death of children the figure has been pegged at around £200-£300. See MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 74-77, 141 (1956). Under the wrongful death statute in England, damages for the death of an infant child are awarded to the parents for loss of the services of the child or for loss of anticipated support from the child. Damages again are small, usually not exceeding a few hundred

The argument for the adoption of a general negligence theory has, so far, assumed that broadening the prospects of recovery for trespassing plaintiffs would be socially desirable. But even if this assumption be denied, as it will be by many, the general negligence approach may, nonetheless, be preferable. An alternative argument proceeds on the ground that this approach, in contrast to rigid categorization, allows all relevant factors to be considered, and, by employing the essentially vague concept of reasonableness, permits judge and jury to carve out expressions of whatever policies seem to them most desirable. The present state of the law can be attacked not only because it makes for harsh results, but also because it is an unnecessarily ugly and cumbersome way of reaching any result at all. The very contrast between the "reasonableness" standard of behavior which is exacted of the defendant in

pounds. See 2 KEMP & KEMP, *THE QUANTUM OF DAMAGES* 117-22 (1956). Under English law no damages may be awarded in the nature of a solatium for grief. Where the child is injured and survives, damages for loss of expectation of life are again low. MUNKMAN, *op. cit. supra* at 77. But here larger damages are likely for pain and suffering, incapacity and disfigurement. Courts have taken notice of the dubious proposition that the sorrows of the child are less enduring than those of the adult. 1. KEMP & KEMP, *op. cit. supra* at 71, cites the opinion of Lord Justice Romer in the unreported case of *Taylor v. Mayor of Southampton* (1952): "They [certain photographs] disclose a terrible state of affairs but on the question of pain and suffering I am reminded of what a very learned judge (the late Eve J.) once said to the effect that the pains and sorrows of childhood are mercifully transient. So I do not attach undue weight to the photographs, or to the undoubted suffering which this little girl underwent." In the examples offered in KEMP & KEMP the following cases of children are indicative of the range of damages common in English courts: *Wheten v. The Lord Mayor, Aldermen and Citizens of Cardiff* (1953, unreported, cited in *id.* at 156) (thirteen-year-old boy with severe injury to frontal bone, necessity for future operation, remote possibility of meningitis developing, 10% possibility of epilepsy—awarded £2250, confirmed by Court of Appeal); *Lee v. Lord Mayor, Aldermen and Citizens of Manchester* (1953, unreported, cited in *id.* at 287) (five-year-old girl had right leg amputated below knee, several operations, skin-grafting; award of £7000 reduced by Court of Appeal to £4000); *Taylor v. Mayor, Aldermen and Burgesses of Southampton* (1952, unreported, cited in *id.* at 323) (six-year-old girl had all toes of left foot amputated, left with flat foot, had to wear special shoe; danger of arthritis; award of £1500 increased by Court of Appeal to £3000).

English courts have said that damages awarded to a child must not be diminished by reason of the prospect that considerable interest may accrue before the child receives them. See *Gold v. Essex County Council*, [1942] 2 K.B. 293, 303, 313 (C.A.). The position in Scotland is reviewed in WALKER, *LAW OF DAMAGES IN SCOTLAND* (1955). In Scotland the award is commonly made by a jury and a solatium for grief is allowed but damages nevertheless tend to be low. *Id.*, app. B at 808, app. D at 813-15 gives, among others, the following examples: *Redpath v. S.M.T. Co.* (unreported, cited in *id.* at 808) (child blinded and permanently disfigured; awarded £6000); *Sharp v. Glasgow Corp.*, [1952] Scots L.T.R. 69 (Sheriff's Ct.) (£390 awarded to parents for death of eight-year-old son, including, comments Professor Walker, £40 for outlays and a deduction of one eighth for contributory negligence); *Sands v. Devan*, [1945] Sess. Cas. 380 (Scot.) (£250 awarded for death of five-year-old son); *Inglis v. L.M.S. Ry.*, [1941] Sess. Cas. 551 (Scot.) (£300 awarded for death of eight-year-old son, but Professor Walker comments that this was a heavy award in the nature of a solatium, as the parents were particularly attached to the child, who was stone deaf).

the ordinary negligence suit and the criterion of wanton or willful conduct by which the occupier is judged in a trespasser's suit makes no sense. Is there any point in saying that the *duty* of the occupier toward the trespasser differs from his *duty* to one who is not the trespasser? Do we mean that the occupier is not bound to act reasonably toward trespassers? This seems an abhorrent way for a civilized system of law to put it. Is it not more elegant and rational to say that what may be reasonable in some circumstances will not be in others? It is a truism that there are no abstract canons of reasonableness; we can only employ the idea of reasonableness meaningfully with regard to particular conduct in a given situation. No advantage can be seen in the offensive statement that an occupier is not bound to act reasonably toward trespassers.<sup>268</sup> The more sensible formulation will be to say that occupation by the defendant and the character of the plaintiff's entry are factors to be considered in assessing the reasonableness of the defendant's conduct. Occupation by the defendant could then be deemed a fact of such central importance that it would always exempt the defendant from responsibility for anything he might do toward a trespasser. But of course the common law has never gone so far. Instead, it has placed the occupier in a special doctrinal category and said that he is liable only for willful or wanton conduct. Now what is reasonable for a butcher may not be reasonable for a mechanic, but we do not set up legal categories for butchers and mechanics. When a man's conduct is called into question we remember that he is a butcher or a mechanic and that is enough.

Whether or not great importance ought to be attached to the fact of occupation in cases of injury on premises is not a legal question. No matter what value is assigned to occupation, concrete cases can still be solved within the notion of reasonableness. Lord Ellenborough and Lord Denning might have very different ideas on what is reasonable for an occupier, but both views could function equally well within the general framework of negligence.

The reason for the disjunction between this branch of the law and the general tort of negligence is quite simply that the special rules pertaining to injuries on premises antedate the development of an overall theory of negligence.<sup>269</sup> But the separation is now indefensible. I have an interest in driving my car but I must compensate the man whom I injure by driving it in an unreasonable fashion. My interests in and duties respecting my possession of property can equally well be comprehensively stated by saying that I must

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268. This was a point perceived by Peaslee, *Duty to Seen Trespassers*, 27 HARV. L. REV. 403, 405 (1914), but he considered it disposed of by asserting that the usual way of putting the matter was no more than a clumsy contraction of the proposition that one cannot owe a duty of care to a person of whom one is not aware. Peaslee's analysis, though attractively and plausibly argued, does not give subtle enough consideration to the foreseeability of trespass in some circumstances and the gravity of the threat which an occupier may pose at anyone who may come on his land.

269. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 184 (1953).

not injure my fellow men by using my property unreasonably with respect to them.

Varying degrees of awareness of the clumsy nature of the old approach have been responsible for the variety of modifications, sometimes overlapping or competing, which have emerged in the last few decades. But these efforts have only made the structure more hideous. They are like an attempt to convert a bicycle into an automobile by adding parts. Each fresh distinction, each supplementary doctrine, comes, no doubt, from a well-meaning design to nuzzle closer to the real problems which clamor for scrutiny in these cases, but often it will have the paradoxical effect of smothering the issues and making their appraisal impossible.

The distinction between the positions of the occupier defendant and the nonoccupier defendant which has emerged so forcefully in England is a good illustration of the obfuscation latent in rigid categories. Under the present English rule, the wanton-and-willful doctrine is to be confined to occupier defendants, while nonoccupiers are to be judged by the general negligence duty of care. Now "occupation" is not a highly refined term of art of the common law, though it is used in a number of statutes. Perhaps the best-known English pronouncement on the nature of occupation is that in *Queen v. Assessment Committee of St. Pancras*:

Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against any one who invades it, but as long as he leaves it vacant he is not rateable [taxable] for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year.

On the other hand, a person who, without having any title, takes actual possession of a house or piece of land, whether by leave of the owner or against his will, is the occupier of it.<sup>270</sup>

Thus, the central ideas of occupation are control and use, notions certainly vague enough to cause difficulty.<sup>271</sup> In *Bent v. Roberts* it was held that a police officer, living in a police house in which he was required to reside by the terms of his employment and from which he was liable to be moved to another station at any time, was not the occupier.<sup>272</sup> Does this mean that he would not be the occupier of the premises for the purposes of a tort action by a plaintiff who had been injured on the premises? In *In re Garland*,<sup>273</sup>

270. 2 Q.B.D. 581, 588 (1877). The case was concerned with whether the appellant was an "occupier of land" under the Valuation (Metropolis) Act of 1869, 32 & 33 Vict., c. 67.

271. See FLEMING, TORTS 430-31 (1957).

272. 3 Ex. D. 66 (1877). The decision was to determine liability for income tax or inhabited house duty.

273. [1934] Ch. 620, applying the observations of Mr. Justice Lusk in *Queen v. Assessment Comm. of St. Pancras*, *supra* note 270.

a testator had devised to his wife any house of which he might be in occupation at the time of his death. When he died, his wife was living in a house which the testator had bought and furnished but in which he had never lived. The court held that, for the purposes of the will, the testator could be regarded as having been in occupation of the house at his death. Would the decision have been the same in an action for an injury sustained on the premises? In *Paterson v. Gas Light & Coke Co.*, the court observed that "the term 'occupier' is ambiguous. In one sense a caretaker is an occupier, but in another sense his occupation is that of some other person."<sup>274</sup> When, if ever, can a caretaker be an occupier in the law of tort?

Confusion is compounded by the suggestion that occupation need not be exclusive, that there can be more than one occupier of the same premises. Dicta to this effect were adverted to in *Creed v. McGeoch*,<sup>275</sup> which seemed to find this idea of dual occupation plausible. Courts detected dual occupation in the Australian decision of *Burton v. Melbourne Harbor Trust*,<sup>276</sup> and in the New Zealand case of *Napier v. Ryan*.<sup>277</sup> The notion of occupation is thus one on which a great deal of labor may have to be expended if the present development of the case law continues. To clarify the concept of occupation will of course be perfectly possible, but the prospect is unattractive when the whole task could easily be dispensed with and when the distinction itself seems to lead to unfortunate results in its application. As one judge confessed in *Creed v. McGeoch*: "It may appear surprising, at least to the parties, that the measure of the defendants' obligation to the plaintiff should depend upon the answer to the question whether they were in occupation of the land. . . . It seems to me, however, that there is no escape from the conclusion that as the authorities stand the distinction . . . does exist."<sup>278</sup>

In *Creed*, the court concluded that the defendants could be regarded as occupying only that portion of the land on which actual construction work was proceeding. Since the defendants' trailer was parked on a part of the land where they had temporarily ceased work, they were not in occupation and consequently were liable to the plaintiff. The conclusion is inescapable that, if the trailer had been parked and the accident had occurred on a part of the land where construction work was still in progress, the defendants would not have been liable.<sup>279</sup> The reaction to such reasoning may well be stronger than the surprise anticipated by the court.

274. [1896] 2 Ch. 476, 482 (C.A.).

275. [1955] 1 Weekly L.R. 1005, 1008 (Liverpool Assizes). The dicta come from the high authority of the House of Lords in *Glasgow Corp. v. Muir*, [1943] A.C. 448, 462-63 (Lord Wright), cited and applied in *Hartwell v. Grayson Rollo & Clover Docks Ltd.*, [1947] K.B. 901, 913 (C.A.); see *Donovan v. Cammell Laird & Co.*, [1949] 2 All E.R. 82 (Liverpool Assizes).

276. [1954] Vict. L.R. 353, 357.

277. [1954] N.Z.L.R. 1234; FLEMING, TORTS 430-31 (1957).

278. [1955] 1 Weekly L.R. at 1008. See the discussion of this case in text at note 109 *supra*.

279. A point made by Montrose, *Note*, 19 MODERN L. REV. 79, 81 (1956).



Use of the occupancy concept as a way of deciding the New Zealand case of *Napier v. Ryan*<sup>280</sup> seems equally arbitrary. In that case, the court found both defendants to be in occupation and control of the carousel and accordingly exempted them from liability. A valuable comment on this decision has pointed out the vacuity of extending the theory of beneficial use of land to those who control movable structures in public places.<sup>281</sup> If any remnant of justification can be found for the distinction between the positions of the occupier and the nonoccupier, it can only lie in the need to protect the occupier in the beneficial use of his real property. To extend the notion of occupation with its attendant immunities to all those who are in control of structures would be to make drastic inroads into the general principles of negligence.

The distinction between occupier and nonoccupier in the United States has at least a modicum of rationality, since in most jurisdictions the underlying theory, thin as it may be, is applied so as to extend the occupier's immunities to anyone who is on the land for the occupier's purposes.<sup>282</sup> In its English application, the distinction has lost all attachment to this function and must be viewed as an utterly arbitrary way of enlarging the trespasser's rights of recovery.<sup>283</sup> Although any such enlargement is in some sense welcome, this device must be regarded as a totally irrational means of securing it.

The division between "occupancy duty" and "activity duty," between static conditions for which the defendant may not be liable and activities or operations for which he will be held to the usual duty of care, appears a somewhat more rational and attractive modification of the old doctrines. On closer examination, however, it is not acceptable as a mature solution of the difficulties. Its weakness derives from the basic antithesis between condition and activity as a criterion of duty or danger. A diving board poised over shallow water<sup>284</sup> and a smouldering submerged fire<sup>285</sup> have been regarded as static conditions

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280. [1954] N.Z.L.R. 1234, discussed in text at notes 185-87 *supra*.

281. Davis, *Liability for Dangerous Premises*, 32 N.Z.L.J. 135 (1956). See also Bowett, *Law Reform and Occupier's Liability*, 19 MODERN L. REV. 172, 176-80 (1956). Professor Davis's solution is to propose that the immunities of the occupier ought to apply only to "immovable property such as open land, houses, railway stations and bridges" and not to "things on such land such as vehicles, merry-go-rounds and houses in the course of demolition." He is undoubtedly right in his demonstration that the application of traditional occupiers' immunities to such movable structures is particularly obtuse, but it may be suggested that his solution is only a partial one. Professor Davis's article contains a close and valuable analysis of *Napier v. Ryan*.

282. RESTATEMENT, TORTS §§ 380-87 (1934).

283. See cases discussed in text at notes 102-10 *supra*, where a simple distinction is taken between occupiers and nonoccupiers and no attempt is made to investigate the nature of the nonoccupier's presence.

284. *Perkowski v. Wellington City Corp.*, [1957] N.Z.L.R. 39 (C.A. 1956), discussed in text at notes 188-89 *supra*.

285. *Rush v. Plains Township*, 371 Pa. 117, 89 A.2d 200 (1952), discussed in text at note 74 *supra*.

for which no recovery is possible, while switching a light off<sup>286</sup> or leaving wax on a floor<sup>287</sup> are held to be current operations for which the plaintiff may recover. The diving board and the fire are perfect examples of traps, and there seems to be no reason why the adult trespasser should be unable to recover for injury sustained from a trap when he can recover for injury sustained from an activity of the occupier. Is it intrinsically more reprehensible to injure a man by doing something which may harm him than by negligently constructing a condition which may harm him, if in both cases his presence was to be anticipated?

The difficulty of abating a condition as compared with the ease of refraining from an active intervention has also been suggested as a rationale for the imposition of liability for dangerous activities. This contrast makes some sense in the extreme cases of, on the one hand, removing some vast natural hazard such as a lake, and, on the other, abstaining from a single dangerous act, such as shooting off a gun, when the presence of a trespasser is known or thought possible. But the discrimination between conditions and activities influences a much wider field of conduct than these simple poles. It may be much more burdensome to abstain from some activities than to remove some conditions. To repair a crumbling step is less disrupting than to cease operating a railroad. And at what point does an incident in an activity become a static condition?<sup>288</sup> If construction workers leave a wall in an unsafe state over the weekend, is this an activity or a condition?<sup>289</sup> If they leave an unsecured and unsafe trailer on the land over the weekend, is that an activity or a condition?<sup>290</sup> Is the determination of this question the best way to inquire into the reasonableness of their behavior? The distinction between occupancy duties and activity duties reflects a brave attempt by harassed tribunals to escape from the wanton-and-willful doctrines, but it is unacceptable as a final solution.

If the supplementary doctrines are designed to raise the issues of negligence and contributory negligence, they fail in the attempt. The notions of technical trespasser and licensee by acquiescence do a little to sharpen the bluntness of the trespasser category as a criterion of the plaintiff's contributory negligence, but they do not go nearly far enough. True, the old doctrine of attractive nuisance, and the more recent theories of nonoccupier liability

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286. *Dunster v. Abbott*, [1954] 1 Weekly L.R. 58 (C.A. 1953), discussed in text at note 118 *supra*.

287. *Slade v. Battersea & Putney Hosp. Management Comm.*, [1955] 1 Weekly L.R. 207, [1955] 1 All E.R. 429 (Q.B.), discussed in text at note 120 *supra*.

288. See the comment of the New Jersey court in *Simmel v. New Jersey Co-op Co.*, 47 N.J. Super. 509, 514, 136 A.2d 301, 304 (App. Div. 1957), quoted in text at note 63 *supra*; Jeffrey, *Accidents to Children*, 31 *AUSTL. L.J.* 442, 449-50 (1957).

289. As happened in *Davis v. St. Mary's Demolition & Excavation Co.*, [1954] 1 Weekly L.R. 592 (Q.B. 1953), discussed in text at notes 107-08 *supra*.

290. As happened in *Creed v. McGeoch*, [1955] 1 Weekly L.R. 1005, discussed in text at notes 109-10, 275, 278 *supra*.

and activity duty, sometimes allow the defendant's negligence to be considered, but their arbitrary nature fails to insure this possibility. Most important of all, the fictitious and artificial nature of these doctrines exercises its own mesmeric effect, so that the judiciary may tend to lose sight of their essential purpose and may apply them blindly to defeat the very ends they were meant to serve.

Unconcealed integration of this branch of the law into the general theory of negligence is the only satisfactory solution. This step would not seem to exceed the powers of judicial lawmaking, at least in the few jurisdictions that have already traveled a way along the road. In any event, a simple legislative enactment could achieve the purpose. The nature of such reform would involve the elimination of plaintiff's status as a legal category carrying a corresponding special degree of duty; the imposition of a general duty of care on defendants; the abandonment of occupation as a legal category; and the adoption of a rule that, in determining whether the duty of care has been discharged, all circumstances of the case must be considered. To make this reform more precise, the statute might include express reference to such doctrines as attractive nuisance, dangerous condition, activity duty, etc., and advise that, prospectively, they are to be of evidential, not decisive, significance. If necessary, express reference might be made to the nature of the plaintiff's entry upon the premises as a circumstance to be considered with all the others in determining whether the defendant discharged his duty of care, and whether the plaintiff is guilty of contributory negligence.

The impact of such a reform on the outcome of litigation is, of course, speculative. That it is a workable approach is clearly shown by the French experience where, in contrast with common-law jurisdictions, this branch of the law operates in a framework of stark simplicity. A powerful objection that inevitably will be raised in United States jurisdictions is that an extension of negligence doctrine will unduly increase the power of the jury. In England, where the jury has all but disappeared in civil litigation, this objection is irrelevant; but, in this country, the argument must be met.<sup>291</sup>

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291. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 185-86 (1953), gives evidence of the awareness in nineteenth-century English judges of the generosity which a jury might show to plaintiffs injured on premises. He quotes from the judgment of Mr. Justice Williams in *Toomey v. London, Brighton & So. Coast Ry.*, 3 C.B. (n.s.) 146, 150, 140 Eng. Rep. 694, 696 (C.P. 1857): "[E]very person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result." The same view was expressed in a leading nineteenth-century American commentary in this field:

Suppose even that the judge . . . tells the jury that, in determining what is reasonable care, they should take into account, not only the desirability of preserving innocent children from harm, but also the desirability of making beneficial use of land. How much weight will the jury allow to the latter consideration when put in competition with the former in a concrete case appealing to their sympathies? How much consideration will they give to the general impolicy of hampering the

Admittedly, any extension of a general negligence approach enlarges the ambit of the jury's role. Further, the current belief that, by and large, the jury is the plaintiff's friend is no doubt justified. Nevertheless, this characterization is not universally accurate; it depends largely on the context of the litigation and the pressures and interests which bear on the judiciary in a particular area. Often, a jury is sought by the defense and opposed by the plaintiff.<sup>292</sup> Even accepting this hypothesis—that relegating cases of trespasser plaintiffs to juries under instructions couched in the language of negligence will increase the number of verdicts against defendants—no vital objection is encountered. Many would encourage an increase in verdicts for the plaintiff as a matter of general policy. Apart from this, there is something distasteful in the view that tribunals cannot be afforded the best equipment for reaching sensible decisions because that equipment is likely to be abused. How long can a legal system survive when it goes in terror of one of its fundamental institutions? No amount of cautionary tales can ultimately obscure the realization that we must either trust the jury or get rid of it.<sup>293</sup> One cannot afford to sympathize for long with the view that a legal system must carry the burden of fictitious and obscurantist doctrine in order to keep vital issues away from that tribunal which was constituted to decide them.

The fundamental questions which surely will emerge from a general negligence approach to this area of law are these: the nature of the plaintiff's entry on the land;<sup>294</sup> the foresight which the defendant had or ought to have had

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use of land with troublesome and expensive restrictions when they have before them a maimed child, or the mourning relatives of a deceased infant?

Smith, *Liability of Landowners to Children Entering Without Permission*, 11 HARV. L. REV. 434, 438-39 (1898).

292. This was the opinion and the experience given to the author in conversation with an attorney acting for an insurance company in this field of litigation. On jury habits with respect to damage awards see Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 368, 375-78 (1957).

293. This is not meant as a plea for allowing the jury omnipotence in all cases. Some division of function and some restriction on the kind of question which it is a jury's province to answer is of course necessary. But, accepting the institution of the jury, then the question of reasonable behavior for the purposes of the law of negligence is eminently not a fit subject for reservation.

294. A point that is worthy of further discussion here is the position of the trespasser plaintiff who is injured while engaged in criminal activity. Here we must distinguish between the trap deliberately laid for the illegal entrant and an injury caused accidentally to him. In England the position is now clear that it is not permitted to set up deadly devices to repel trespassers. WINFIELD, TORT 60-61 (6th ed. Lewis 1954). In the United States a distinction is taken between those who break and enter and petit thieves or simple trespassers. The former may be unable to recover even for injury caused by a deadly device, while the latter in such circumstances will be allowed to recover. Some of the cases are reviewed in 31 TEXAS L. REV. 80 (1952). For a full discussion, see 2 HARPER & JAMES 1440-42. An interesting illustration of the problem occurred in the Canadian case of *Danluk v. Birkner*, [1946] Ont. L.R. 427, [1946] 3 D.L.R. 172 (C.A.), *aff'd on other grounds*, [1947] Can. Sup. Ct. 484, [1947] 3 D.L.R. 337. In

of such an entry; the kind of threat posed by the defendant to those who might come on his land; the social utility of the process or condition maintained by the defendant;<sup>295</sup> the ease with which the defendant could protect the plaintiff from this threat; the measures which the plaintiff took or ought to have taken for his own protection. All were suggested and occasionally clearly and comprehensively raised under the old doctrines, but too often they were perceived only in a fragmentary and clouded fashion or were stifled completely. Courts cannot be forced to sensible decisions, but at least they can be offered the theoretical equipment which may best enable them to reach such decisions.

The general negligence approach has not lacked advocates. The current peaks of development are the New Jersey Appellate Division's decision in *Simmel v. New Jersey Coop Co.*<sup>296</sup> and the Australian case of *Thompson v. Bankstown*.<sup>297</sup> In England, notable contributions have been made by Lord

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that case the plaintiff had been present in a betting establishment when a police raid took place. In seeking for an avenue of escape, he ran out through a door which opened on a sheer drop. In an action against the proprietors of the betting establishment, the Ontario Court of Appeal held that his participation in criminal activity barred his recovery. The Supreme Court of Canada affirmed the decision on the ground of the plaintiff's rashness and did not discuss the question of his involvement in a criminal activity. For similar United States cases, see *Manning v. Bishop of Marquette*, 345 Mich. 130, 76 N.W.2d 75 (1956) (recovery allowed plaintiff injured when leaving church after playing bingo there; Ontario Court of Appeal decision in *Danluk v. Birkner* criticized); *Shiroma v. Itano*, 10 Ill. App. 2d 428, 135 N.E.2d 123 (1956) (plaintiff injured in hall when invited by a tenant of apartment house to play poker; in an action against the landlord a directed verdict for defendant was reversed). In *Danluk v. Birkner* and *Manning v. Bishop of Marquette* the defendants were of course the plaintiff's accomplices in illegal conduct. If it is felt that the general negligence approach does not provide a firm rationale for taking proper account of the plaintiff's criminal conduct, the general principle of *ex turpi causa non oritur actio* is always available.

295. The social utility aspect received express discussion in *Dugan v. Pennsylvania R.R.*, 387 Pa. 25, 127 A.2d 343 (1956). In that case the plaintiff, an eleven-year-old boy, was injured while climbing over the cars of a stationary freight train, when he pointed to an overhead high voltage wire to warn his younger brother. The current jumped, causing him severe injuries. The appellate court reversed a verdict for the plaintiff, saying that the attractive nuisance doctrine is now superseded in Pennsylvania by § 339 of the *Restatement of Torts*, which requires, for the child plaintiff to recover, that the condition maintained by the occupier be of slight utility when weighed against the risk to children. Here, the court felt, the electric wires were of great utility and it would be impractical to expect the defendants to provide patrolling guards or a fence. To this it may be said in reply that if railroad technology can offer no means of making such wires safer, then railroads ought to shoulder the burden of insuring children against the injuries they may suffer in the course of their natural explorations. It is time to sweep away these vestigial remnants of the nineteenth-century belief that uncompensated accidents to children are a regrettable but inevitable toll levied by the paramount demands of commerce and travel.

296. 47 N.J. Super. 509, 136 A.2d 301 (App. Div. 1957), discussed in text at note 61 *supra*.

297. 87 Commw. L.R. 619, [1953] Argus L.R. 165 (Austl.), discussed in text at notes 178-84 *supra*.

Denning,<sup>298</sup> and in Canada by Justice of Appeal O'Halloran.<sup>299</sup> In juristic writing, the approach has been urged by Marsh<sup>300</sup> and Montrose<sup>301</sup> in Britain, by Jeffrey<sup>302</sup> in Australia, and by Harper and James<sup>303</sup> in the United States. At the same time, there have been voices of protest. In an article commenting on the English Occupiers' Liability Act,<sup>304</sup> Payne raises two points which appear troublesome and must be met.<sup>305</sup> He thinks that, despite an initial reform, the courts may in time rebuild the strict rules as to what constitutes due care in particular circumstances, so that the virtue of integration into general negligence theory may be overrated.<sup>306</sup> Courts will take notice of the plaintiff's entry onto land without permission; they will take notice of the kind of threat posed by an activity as compared with a condition; they will take notice of the practicality of abating an artificial danger as compared with a natural one. As cases cluster and precedents harden, we shall be back where we started.

If the old distinctions were accurate and subtle reflections of the issues of negligence and contributory negligence, this criticism would be most astute. Payne was referring expressly to the cases of invitee and licensee plaintiffs. With respect to trespassers, it is suggested, the old distinctions are in fact vehicles of disguise and distortion and their re-emergence is therefore not to be expected. In the area of automobile injuries to pedestrians, no distinction between accidents caused by the defective state of an automobile and those attributable to careless operation has emerged. Such a distinction might be relevant in a particular case, but as a category of decision it is hopelessly irrelevant. Payne assumes, at least as to licensees and invitees, that the old distinctions are natural reflections of necessary principle. With trespasser plaintiffs this is not so.

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298. See the opinions of Lord Justice Denning, as he then was, in the cases discussed in text accompanying notes 118, 123, 133 *supra*.

299. See the opinions of Justice of Appeal O'Halloran in the cases discussed in text accompanying notes 164, 167, 168 *supra*.

300. Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers* (pts. 1-2), 69 L.Q. REV. 182, 359 (1953). These very valuable articles by Mr. Marsh include brief treatments of the law of Scotland, South Africa, France and Germany.

301. In a series of case notes in the *Modern Law Review* cited in notes 98, 103, 104, 118, 120, 123, 131 *supra*.

302. Jeffrey, *Accidents to Children*, 31 AUSTL. L.J. 442 (1957). Mr. Jeffrey's valuable article and very stimulating argument is confined to cases of child plaintiffs.

303. 2 HARPER & JAMES 1470: "[T]he right of exclusive possession does not carry with it the privilege to engage in conduct fraught with unreasonable probability of harm to the lives and limbs of people merely because there is no consent to their presence."

304. 5 & 6 ELIZ. 2, c. 31 (1957).

305. Payne, *The Occupiers' Liability Act*, 21 MODERN L. REV. 359 (1958).

306. Mr. Payne adopts here the argument of Mr. Diplock, Q.C., in his dissenting opinion to the Law Reform Committee, *Third Report: Occupiers' Liability to Invitees, Licensees and Trespassers*, CMD. NO. 9305 (1954). Odgers, *Occupiers' Liability: A Further Comment*, 1957 CAMB. L.J. 39, 54 (1957), also takes the view that specific amendments to the old law would have been preferable to a general remodeling.

Payne's other and perhaps more fundamental point is that the advocates of the general negligence approach belong to that band of "critics of mechanical jurisprudence" who "appear sometimes to forget that a legal system has the practical function of resolving and preventing disputes and to place a pathetic trust in the infallibility of judicial discretion."<sup>307</sup> The function of resolving disputes is certainly the last thing one ought to forget and the advocacy of a general negligence approach is directed precisely to this end: it seeks the rational and just solution of disputes. But Payne is also concerned with preventing disputes. He amplifies this when he says:

The greater the discretion conferred on the court, the more uncertain the outcome of a case will be, and therefore the higher will be the proportion of cases that go to trial instead of being settled out of court.<sup>308</sup>

A legal system must, in the nature of things, create and impose its own comparatively rigid categories on the phenomena which it seeks to control, and the seemingly arbitrary operation of them in borderline cases is the price one has to pay for some degree of legal certainty and for the exclusion of bias in the judicial process.<sup>309</sup>

Here Payne's trust in the definitive efficacy of legal rules seems at least as pathetic as that which he sees in the critics of mechanical jurisprudence. To be convincing in this position, he would have to show that personal injury suits brought by wanted or unwanted visitors under the present dispensation are proportionately fewer than those in the area of general negligence. Even a showing to that effect would be inconclusive, for the differential might well be due to the inadequacy of the present rules. The introduction of a National Health Service in Britain brought with it a vast increase in demands for dental and optical treatment, but to deplore this one would have to be more concerned with the leisure of doctors than with the health of the people. Judicial discretion is scarcely infallible; however, it is preferable to a set of bad rules, and may sometimes be preferable to a set of good ones. Payne's view—that injustice in the borderline case is "in the nature of things" and "the price one has to pay"<sup>310</sup>—is both unrealistic and unpersuasive.

One fear that underlies Payne's opposition to the general negligence approach is his belief that, in the English system of trial by a single judge without a jury, greater discretion conferred on the judge will lead to more appeals.<sup>311</sup> There is, he suggests, a tendency to treat questions of fact as questions of law in appeals from judges sitting alone, with the result that any introduction of general negligence theory might be followed by a series of pronouncements from appellate courts on the standard of care owed in particular circumstances. Here he has a valid point, but the fault is surely one

307. Payne, *The Occupiers' Liability Act*, 21 MODERN L. REV. 359, 374 (1958).

308. *Ibid.*

309. *Id.* at 373.

310. *Ibid.*

311. Cf. Payne, *Appeals on Questions of Fact*, in 11 CURRENT LEGAL PROBLEMS 185 (1958).

in English appellate practice and not in negligence law. The American desire to complicate the law in order to insulate the jury seems to be matched by an English desire to complicate the law to compensate for the absence of a jury. United States jurisdictions may, on this point, take comfort in the presence of the jury which, it seems, is a great nuisance when you have it, but, like vitamins and money, may be even more troublesome when you don't.

The plea for a free adjudication of cases of injury to trespassers within the notions of reasonable conduct is made in the belief that this is a small but especially poignant segment of the eternal problem of accident and pain and grief. Where national insurance does not exist, private insurance must be incited to cover as wide a field as possible. We are dealing here with rules of law which emerge from the agony of children. In these disputations over their broken bodies, unreflecting dogma must be a trespasser to which no leave and license can be granted.